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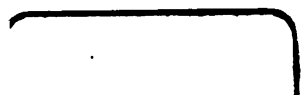
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# THE REPORTS, 1864-1874.

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## DECISIONS

OF THE

## Supreme Court of Newfoundland.

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ANNOTATED, REVISED AND EDITED

By E. P. MORRIS,

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**THE UNIVERSITY OF CHICAGO**

## PREFACE TO THE FIRST VOLUME.

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THE importance to the legal profession of having in an available form the decisions, which from time to time have been given in our Supreme Court, must be so obvious that it might appear unnecessary to say anything by way of notice or preface to the present work. Since the granting of the Royal Charter, 1825, only one volume of Reports or Decisions of the Supreme Court has been published, namely, in the year 1829, containing the decisions of the years from 1817 to 1826.

I propose that the present series shall consist of about six volumes, embracing all the reported decisions of leading cases of our Courts on points of law and general interest. The present volume, as will be seen by reference, embraces all the reported decisions from 1884 to 1896, inclusive. The second volume, now in the hands of the printer, will contain the decisions from 1874 to 1884, and so on, down to the date when the volume previously referred to was issued, each volume embracing about ten years' decisions.

I have formed the present volume out of such cases as I deemed important and instructive, and omitted such cases only as appeared not important for the current study and practice of the law, and which were only an affirmation of principles long since settled by English Courts.

In the work of revision I have been careful not to abridge any judgment except as to the pleadings or statement of facts, and unimportant as regards the results. The reasoning of the Judge and the authorities cited, no matter how prolix, have in no way been retrenched. In cases where three judgments have been given in the same cause, I have published in full, without any curtailment, the one which in every respect appeared the fullest. In but few cases has a judgment standing alone been abridged.

The head note to each case has been constructed with a view of putting briefly and without unnecessary use of technical phraseology a digest of each decision. My aim has been to furnish the practitioner with reports of our own Courts in such a form that he will readily find the information he requires for ordinary purposes.

No criticism of the work will be more severe than my own, as no one can be more sensible of its manifest imperfections. It was performed during the past year, in odd hours when free from public and professional duties, and at no time have I been able to give to it that undivided and consecutive attention which I should have liked to have bestowed upon it.

If the result should be of use to the profession, and the learning and research of those who preceded us made available, then I shall be amply repaid for the toil and labour expended on the work.

E. P. MORRIS.

ST. JOHN'S, MARCH 18TH, 1897.

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## DECISIONS OF THE SUPREME COURT OF NEWFOUNDLAND.

---

QUEEN *v.* CAREW. \*

1864, *January.* BRADY, C. J. ; LITTLE, J. ; ROBINSON, J.

*Crown—Royal prerogative—Exercise of—Practice in—Verdict of wilful murder—Conditional pardon—Grounds for—Insanity—Irregularity in taking jury lists.*

On a trial for wilful murder the prisoner whose defence was insanity was found guilty. Subsequently on a motion for a new trial, it was contended in argument amongst other grounds that the jury lists prescribed by the Jury Act had not been prepared conformably with the statute. This was admitted by the Attorney General. On the same argument it was admitted that the evidence established against the prisoner the fact of homicide. Without giving any decision on the point raised in the argument, the Judges in a letter addressed to His Excellency the Governor recommended that it was a case for the exercise of the Royal prerogative. His Excellency accordingly having taken the matter into consideration, in the presence of his Executive Council and the Judges of the Supreme Court, approved of the same, and the prisoner was accordingly sentenced to confinement in the Lunatic Asylum during Her Majesty's pleasure.

PRISONER being arraigned, pleaded not guilty. Petty Jury were empannelled and sworn. The Attorney General stated case to the jury for the prosecution, and called witnesses. The prisoner's counsel addressed jury and called witnesses for the defense. The Crown then entered upon a rebutter case, and called Charles Crowdy. The prisoner's counsel then addressed jury on the rebutter case. The Attorney General then addressed jury on behalf of Crown. Mr. Justice Little then summed up.

The jury then retired, and after considerable deliberation, came into Court and desired to have the evidence of Dr. Stabb read to them.

This having been done, they again retired to their jury-room, and about half-past eight o'clock, p m., came into Court with a verdict of Guilty.

---

\* For full report of this case by the late Prescott Emerson, Q.C., including evidence of witnesses, addresses of counsel, charge of Justice Little to jury, and correspondence between the Judges of the Supreme Court and Governor Bannerman relative to the exercise of the Royal prerogative, see *Day Book*, January, 1864.—EDITOR.

*Per Curiam*.—Have you considered carefully the evidence of insanity?

*By the Jury*.—We have, my Lords.

The verdict was then recorded, and the prisoner remanded, and ordered to be brought up on the following Thursday for final judgment.

The Court then adjourned.

December 8.

Present the Chief Justice and the Assistant Judges.

Mr. Hogsett moved for a new trial on the following grounds:

1—That the *Venue* was not proved—the only evidence being that the crime was committed in Broad Cove, in Bonavista Bay. Bonavista Bay had not been proved to be in Newfoundland.

2—That evidence was received by the Court which should not have been received, and that if it were properly admitted, testimony was rejected by the Court which should have been received.

3—That the verdict was contrary to evidence, the testimony of the medical witness and others having established the insanity of the prisoner.

4—That the trial was illegal, inasmuch as the jury was not constituted pursuant to the Statute 19 Vic., cap. 13.

The learned counsel contended, in support of his first objection, that the evidence did not show that the murder took place in Newfoundland, but at Broad Cove in Bonavista Bay; but Bonavista Bay had not been proved to be in Newfoundland, and the Court could not judicially notice that it was so. The Crown had undertaken to prove that the crime had been committed in Newfoundland, within the jurisdiction of the Court, and had failed to do so. The *venue* was Newfoundland, S. S.

Secondly, that evidence was rejected that should have been admitted. Questions had been allowed to be put, based on the assumption of facts proven, and the following one, put by him, (Mr. Hogsett), had been rejected:—

May a person laboring under *melancholia*, and who commits murder while so affected, be unconscious that his act involved that crime?

That question, as framed, was purely scientific, and had been put to Dr. Stabb, whose profession enabled him to speak scientifically. The answer of Dr. Stabb, to a question put by the Crown, was that the symptoms indicated by the acts proved,

showed a diseased mind. *Melancholia* was a species of insanity which Beck stated to have a tendency in some cases to homicide.

That the testimony for the Crown was improperly admitted on this point, or that the rejection of the evidence for the prisoner was against law. The learned counsel then read the following affidavits :—

*The Queen v. Michael Carew.*—Henry H. Stabb, of St. John's, in the Central District of the Island of Newfoundland, Superintendent of the Hospital of the Insane, maketh oath and saith, that the facts disclosed at the trial of the above cause indicated a state of mind amounting to insanity on the part of the above-named Michael Carew. That deponent is of opinion, derived from the said facts that the said Michael Carew, at the time of the commission of the offence of which he is convicted, was insane, and not an accountable being; and this deponent further saith, that he has read and recollects the question put to him by Mr. Hogsett, a copy of which is under-written, on the trial of the above cause, and which the Court would not permit deponent to answer. That if deponent had been permitted to answer the said question, his reply would have been, yes; and lastly, deponent saith, the evidence he gave upon the trial of this cause, he is convinced is correct; and he is the more confirmed in this view from the bodily and mental weakness of the said Michael Carew at the present time.

HENRY H. STABB.

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*The Queen v. Michael Carew.*—Joseph Shea, of St. John's, in the Central District, of the Island of Newfoundland, M. D., and Henry H. Stabb, of the same place, Physician Superintendent of the Hospital of the Insane, severally make oath and say, that on the 7th day of December, instant, they examined the above-named Michael Carew, confined in Her Majesty's Gaol, in this city, and found him to be suffering from confusion of that intellect, apparently depending upon the weakness of mind and body. That the said Michael Carew has also symptoms of some disease of the brain or its membranes; that deponents cannot say that the said Michael Carew is at this moment evidently insane, neither can they assert, nor would they be understood to say, that he is of sound mind and body; and deponents emphatically swear that they make the foregoing statements, totally excluding from their minds any knowledge of the previous condition of the said Michael Carew.

J. SHEA, M. D.,  
HENRY H. STABB.

Counsel then reviewed the whole of the evidence, and contended that it proved that the prisoner was insane. The Medical witness, had, on his examination, stated that a man who would commit such acts as were proved against the prisoner, was insane.

In support of the fourth objection, that the jury was not properly constituted, counsel read the following affidavit :

## IN THE SUPREME COURT.

*The Queen v. Michael Carew.*—George James Hogsett, of St. John's, in the Central District of the Island of Newfoundland, Barrister-at-Law, maketh oath and saith, that he has made enquiries at the office of the Sheriff of the Central District aforesaid, John V. Nugent, Esq., and has been informed by the said Sheriff, and Mr. Jeans, that the Petty Jury List, from which the panels were drawn and summoned for the present term of this Honorable Court, was not revised by the Magistrate on the last Tuesday in January of the present year, as directed to be done by the 8th section of the 19th Vic., cap. 13; nor did the said Magistrates furnish the returns prescribed by the said Statute; and deponent further saith that he was not aware of the above facts until after the trial and verdict delivered in the above cause.

GEO. JAS. HOGSETT.

The 8th section of the Jury Act, 19 Vic., cap. 13, was imperative on the Magistrate, to revise the list of Jurors, and to furnish such revised list to the Sheriff. Counsel cited *Rex v. Fowler*, 4; *B. & Ald.*, 7; *Bacon's Abrid.*, 771; 7 *Mod. Rep.*, 54; 11 *Q. B.*, 779; and contended that on their authority the Court should set aside the verdict, and grant a new trial.

*Little, J.*—If the objection prevail, would it not hold good against the constitution of the Grand Jury who found the Bill?

*Mr. Hogsett.*—Certainly.

Court then adjourned the further hearing of the argument until to-morrow, at 11 o'clock, a. m.

*December 9.*

The Court met at 11 o'clock, a. m.

The Attorney General then replied. There were four grounds of exception taken to the passing of sentence on the prisoner. First,—That the offence was not shown to have been committed within the jurisdiction of the Court—that the *venue* was not laid in the right place. He thought that the evidence could not have been more complete as to time, place, and circumstance. He would take, for instance, the deposition of Mr. Murphy, read at the trial, and who stated that he was one of Her Majesty's Justices of the Peace for the Northern District of Newfoundland. The Court would, however, without that, take judicial notice of Bonavista being within the jurisdiction of the Court, from the Representation Act, and the Proclamation of the Governor, setting the limits of each district. Counsel referred to Roscoe, where it was stated the Court would take judicial notice of the Counties of England. Secondly, as to the improper re-

jection and reception of evidence. That arose upon the reception of evidence of medical opinion, touching a question of skill and scientific knowledge, lying within the peculiar experience of the witness. It had been in the prisoner's own favor, and his case would have been very lame without it. He did not see how the learned counsel could properly except to it. As to the rejection of the question alluded to, he considered that it was applied, in this case, to a matter of fact, wholly to be decided by the jury—and had the witness been permitted to answer it, he would have usurped the jury's province. With reference to the third objection, the learned counsel had contended that the prisoner was insane. The evidence fell short of establishing that fact, and in no way shewed that he was not a responsible being. The most important point, however, as relied upon by the learned counsel was, that the Jury List had not been revised by the Magistrates, according to law. Now he (Attorney General) could not justify, in any way, such omission—he refrained from passing any opinion upon it. He submitted, however, that such objection was now too late. It would probably have been a good ground of challenge to the array; but at this stage of the proceedings, was useless. Cites Kennedy on Juries. *O'Connel's case*, 4, *State Trials*, 10 *M. & W.*, 605; 11, *M. & W.*, 826. In this instance there was a waiver of *concensus tollitur errorum*. There was no affidavit to shew that any person who sat on the Jury was disqualified. *Hill v. Jacques*, 12, *East. Arch. Prac.* 86; 8, *B. & C.*, 761; 7, *D. & R.*, 864. *Tidd's Prac.*, 2, *D. & R.*, 126. A *venire de novo* was granted when the defect appears at the face of the record; a new trial where the matters were *de hors* the record.

In the Cat's Cove case, the point had been expressly decided, that the challenge to the polls must have been taken on the trial.

Mr. Hogsett then replied, and again urged his objections and referred to 11, *Mod.*, 119, where it was ruled by *Holt, C. J.*, and *Powys, J.*, and *Gould, J.*, that "if a party have a cause of challenge, and know of it time enough before the trial, if he do not challenge, he shall not have a new trial; *contra*, if he has not timely notice of it." This was in the case of *Lady Herbert v. Shaw*, where a letter had been written by the Duke of Leeds to every particular Juror.

The Court then adjourned, and, at a subsequent sitting, the prisoner was ordered to be brought up for judgment on the following Tuesday.

*Tuesday, December 15.*

Court met at eleven o'clock, a. m.

The case of the *Queen v. Michael Carew*, having been called, the Chief Justice said :—

Michael Carew, a course has been adopted since your conviction, which has rendered it unnecessary to decide the objections to the verdict of “guilty” in your case, which were brought under our notice by the learned counsel who defended you; and which has also relieved us from the painful duty of pronouncing sentence of death upon you.

We addressed to His Excellency the Governor a communication, which the law empowered us to make, and after the most grave and anxious consideration of every matter brought under our notice at your trial and subsequently, we felt that we were justified, “in favour of life,” in making that communication, and His Excellency has been mercifully pleased to act upon it. The communication was in these words :—

JUDGES' CHAMBERS,  
St. John's, Newfoundland,  
10th December, 1863.

MAY IT PLEASE YOUR EXCELLENCY,—

In the case of the *Queen v. Michael Carew*, tried before the Supreme Court during the present term, in which the prisoner was charged with, and by a verdict of a jury convicted of, the murder of Jane Carew, his wife, we respectfully submit, for Your Excellency's consideration, the annexed copies of affidavits, which were filed in the Supreme Court, in that case, subsequent to the trial, upon a motion for a new trial. On the discussion that arose upon one of those affidavits, the Attorney General admitted that the lists of jurors prescribed by the Jury Acts had not been prepared conformably with the Statutes. The counsel for the prisoner, Mr. Hogsett, admitted on the same arguments, that the evidence established against the prisoner the fact of homicide, and only contended that he should have been acquitted upon the ground of insanity. From the foregoing facts and affidavits, as well as from the favorable circumstances appearing at the trial, we humbly recommend the prisoner, Michael Carew, to Her Majesty's mercy, and to a pardon, upon condition of his being imprisoned during Her Majesty's pleasure.

In making this recommendation to Your Excellency, we desire not to be understood as casting the slightest reflection or imputation upon the jury who tried the case.

(Signed), FRANCIS BRADY, *Ch. J.*,  
P. F. LITTLE, *Asst. J.*,  
BRYAN ROBINSON, *Asst. J.*

~ In reply we received Her Most Gracious Majesty's pardon, which the Officer of the Court will read to you.

M. W. Walbank, Esq., the Clerk of the Court, then read the following Conditional Pardon :—

A. BANNERMAN,  
Governor of Newfoundland.  
[L. S.]

*VICTORIA, by the Grace of God, of the  
United Kingdom of Great Britain and  
Ireland, Queen, Defender of the Faith.*

To Our trusty and well-beloved, Our Chief Justice and Assistant Judges of Our Supreme Court of Newfoundland, and to all others whom it may concern :

Whereas, We did, by certain Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster, the fourteenth of February, in the twentieth year of Our reign, constitute and appoint Our trusty and well-beloved Sir Alexander Bannerman to be Our Governor and Commander-in-Chief, in and over Our Island of Newfoundland, and the Islands and Territories within the limits therein described ; and whereas, by the said Letters Patent, We did give and grant to the said Sir Alexander Bannerman full power and authority as he shall see occasion, in Our name and on Our behalf, to grant to any offenders convicted of any crimes in any Court, or before any Judge, Justice or Magistrate, within Our said Island, a Pardon, either free or subject to lawful conditions, but subject to the regulations and directions contained in the instructions given to Our said Governor, under Our Royal Sign Manual and Signet, bearing date at Our Court, at Buckingham Palace, the fourteenth day of February, aforesaid. And whereas Our trusty and well-beloved, Our Chief Justice and Our Assistant Judges of Our Supreme Court of Newfoundland, have represented to Our Governor, that in term of Our Supreme Court, now being holden in St. John's, in Our said Island of Newfoundland, Michael Carew, of Broad Cove, Bonavista Bay, fisherman, was tried and convicted of the wilful murder of one Jane Carew, the wife of the said Michael Carew. And whereas Our said Chief Justice and Assistant Judges have reported to Our said Governor, that from certain favorable circumstances appearing at the trial of the said Michael Carew, as well as for divers matters in relation to the preparation of the jury lists of the said Court, and brought to the notice of Our said Chief Justice and Assistant Judges since the trial, they have considered that Our Royal Prerogative may be properly exercised in behalf of the said Michael Carew, and they have accordingly recommended to Our said Governor to grant a Pardon to the said Michael Carew, upon condition of his being placed in confinement during Our pleasure. And whereas Our said Governor, in accordance with Our Royal Instructions aforesaid, in presence of Our Executive Council and Our said Assistant Judges, having taken into consideration the report and recommendation of Our said Chief Justice and Assistant Judges, has approved of the same : Now, therefore, know ye, that we do hereby, of Our free will and pleasure, extend Our Mercy and Grace to the said Michael Carew, and do grant to him Our Pardon for his said crime, but upon the express condition, nevertheless, that he, the said Michael Carew, shall be confined during Our pleasure, in the Lunatic Asylum of St. John's, aforesaid, or in such other place as Our Governor for the time being, of Our said Island, may direct.

In testimony whereof, we have caused these Our Letters to be made Patent, under the Great Seal of Our said Island.

Witness Our trusty and well-beloved Sir Alexander Bannerman, Knight, Our Governor and Commander-in-Chief, in and over Our said Island and its Dependencies, at St. John's, in Our said Island, the fourteenth day of December, 1863, and in the Twenty-seventh year of Our reign.

By His Excellency's Command,

R. CARTER,  
Acting Colonial Secretary.

The Chief Justice,—Therefore let the said Michael Carew be confined, during Her Majesty's pleasure, in the Lunatic Asylum of St. John's, or in such other place as the Governor, for the time being, of this Island, may direct; and in the meantime, be remanded to Her Majesty's gaol of St. John's.

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*Letter from Captain Coen, Private Secretary to His Excellency  
Sir Alexander Bannerman.*

GOVERNMENT HOUSE, Dec. 21, 1863.

SIR,—Having intimated to the Governor your intention of publishing a report of the recent trial of Michael Carew, for the murder of his wife, and being desirous of giving a correct account of the whole proceedings connected with that trial, and expressed a wish that His Excellency would favor you with the circumstances which occurred relative to the conditional pardon granted by the Crown to the prisoner, considerable discussion having taken place on the subject, His Excellency can see no objection to accede to your request, and desires me to acquaint you :

That the Letters Patent granted by the Crown, appointing the Governor of the Colony, vest in him full power and authority, "as he shall see occasion, in name of, and on behalf of the Crown, to grant to any offenders convicted of any crimes, in any Court, or before any Judge, Justice or Magistrate, in Newfoundland, a pardon, either free or subject to lawful conditions, or any respite, &c., &c., subject to the regulations and directions contained in the Instructions under the Royal Sign Manual and Signet accompanying the Governor's Commission."

In all cases, therefore, the Governor is vested with the power of granting pardons, free or conditional ; but in the case of murder, (vide 37th paragraph of the Royal Instructions, which were publicly read and printed on his assumption of the Government,) he, the Governor, is "required, and enjoined to call upon the Judge presiding at the trial, to make a written report of the case, and such report of the said Judge shall be taken into consideration at the first meeting, conveniently held, of the Executive Council, where the said Judge shall be specially summoned to attend"; and the Governor "shall not grant a pardon or reprieve, unless upon receiving the advice of the Executive Council therein, if it shall appear to

the Governor expedient to do so ; but, in all such cases, he is to decide either to extend or withhold a pardon or reprieve, according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise ; entering, nevertheless, on the Minutes of the said Council, his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the members of the said Council."

The proceedings which took place in Carew's case are as follows:—

On the afternoon of the 16th December, the Governor received the document signed by the Chief Justice and his two colleagues, (enclosing copies of affidavits which were filed in Court upon the motion for a new trial), which, he observes, has been read in Court.

On the morning after the receipt of the above the Governor addressed a note to the Chief Justice, stating that he considered the case to which the Chief Justice and his colleagues referred was an important one, and which ought to be dealt with great consideration ; and, so far as he, the Governor, was concerned in the exercise of the prerogative, he was decidedly of opinion that he ought to adhere as closely as possible to the instructions which are laid down for his guidance in cases of murder ; that he had stated his views to the Attorney General, in regard to the documents referred to, and that the Chief Justice and his colleagues must therefore see that some days would elapse before this matter could be settled.

A Council was, therefore, summoned for the 14th, and the Governor having received a written report from the Judges the meeting was held at Government House on that day—Judges Little and Robinson being present—Mr. O'Brien and Sir Francis Brady, absent from indisposition. The Governor's Instructions having been read to the Council, as well as the Judges' letter of the 10th December, and subsequent report, the Governor stated that the Council had been summoned to take into consideration a very important case, that of Michael Carew, convicted, at the present sitting of the Supreme Court, of the murder of his wife.

In the document referred to, it appeared that the prisoner's counsel had applied for a new trial, on the grounds stated in the affidavits which had just been read. It was not the province of the Council to say whether or no a new trial should have been granted,—that was a matter which entirely rested with the Court ; but the grounds on which that trial was moved for by the prisoner's counsel were, certainly, matters which ought to be taken into consideration. They are four in number—the

*First*,—That there is no evidence that the crime was committed in Newfoundland—which the Governor thinks may be passed over.

*Second*,—Improper admission of evidence, and improper rejection of evidence of medical witnesses. There did not appear in the documents referred to anything to shew that there was improper admission of evidence on the trial ; and in regard to the rejection of evidence of medical witnesses, it appears that a question put to the Physician of the Lunatic Asylum by the prisoner's counsel, (relative to the effects of *melancholia* producing insanity, and rendering persons so afflicted unaccountable for their actions), and answered in the affirmative, although rejected as evidence, was heard in Court, where the jury might, if they had desired it, have obtained further information on the alleged temporary insanity of the prisoner.

*Third*,—The verdict contrary to evidence. On this point the Judges had expressed an opinion in their letter to the Governor of the 10th, (in

which he concurred), and from their report, which had been read, he thought the jury could have arrived at no other conclusion than that Michael Carew was guilty of the murder of his wife—in accordance with their verdict.

*Fourth*.—That the trial was a nullity, the jury not being constituted according to law, no revision of the jury lists having been made by the Magistrates. On this last objection, the Governor requested to know from the two Judges whether if, as had been stated, the prisoner's counsel had discovered, and made the objection in time, it would have been a valid one, and sustained by the Court? The learned Judges having answered in the affirmative, the Governor had now only to state to the Council that in some cases, under particular circumstances, the Judges in England have considered it proper to recommend convicted criminals to the mercy of the Crown, before being sentenced, and that Her Majesty has (the Government believed), as advised by Her Secretary of State and Law Officers, invariably attended to such recommendations. It was the opinion of the Governor nevertheless, that in parts of the Queen's dominions distant from the residence of the Sovereign the proper course to be pursued, on convictions of murder, would be—that sentence should follow, (as indicated in the Royal Instructions already referred to), when recommendations to mercy, whether from the Court, the Jury, or parties in the criminal's behalf, must always meet with careful and anxious consideration from those to whom has been delegated the weighty responsibility of the exercise of the prerogative of granting or withholding free or conditional pardons, in criminal cases.

The Judges, in their letter of the 10th, alluded to "other favorable circumstances on the trial," and there appeared no evidence to shew that the crime committed by the prisoner had been premeditated; and the Governor believed the Council would coincide with him that, in accordance with the Judges' unanimous recommendation, a conditional pardon be granted to the prisoner.

The members of the Council present separately expressed their concurrence in the Governor's decision, and the Attorney General was requested to prepare the necessary documents, and officially announce the same to the Court.

The Governor having acceded to your request, I may inform you that while acting in the same capacity, a few years ago, in another colony, precisely the same course was adopted by him relative to a criminal who was convicted of a cruel and premeditated murder, and sentenced accordingly. The Chief Justice and Council having been summoned, and there being no circumstance to justify mercy being extended to the convict—a female—she was executed in accordance with her sentence.

In conclusion, the Governor takes it for granted that you were present, and took notes at the trial of Carew, and are in a position to give a faithful and accurate report of it.

I have the honor to be, Sir,  
Your obedient and humble servant,

W. J. COEN, Private Secretary.

TO PRESCOTT EMERSON, Esq., &c., &c.

*Hon. H. Hoyles, Attorney General, for crown.*

*Mr. Hogsett for prisoner.*

1864, *February*. HON. MR. JUSTICE ROBINSON.

*Insolvency—25 Vic. cap. 7, sec. 7—Fraud—Keeping false accounts—Breach of trust—False pretences—False statements—Withholding books of account.*

Where on the examination of the petitioners, who had voluntarily come before the Court praying that they might be declared insolvent, it appeared from their own examination and the examination of witnesses called who were creditors, that petitioners had (a) kept false books of account; (b) fraudulently withheld certain entries from their books of account; (c) wilfully destroyed their books of account; (d) withheld at their examination books of account and papers; (e) contracted debts by breach of trust and false pretences; they were declared insolvent, but on motion on behalf of creditors they were adjudged liable to punishment and committed to prison for fraud.

THE petitioners, James Power and Michael Power, have petitioned this Court to be declared insolvent, pursuant to their schedule, which shews assets to the amount of £409 3s. 10d., and as amended debts due by them amounting to £4,039 13s. 11d. The examination of the petitioners and witnesses has occupied three days. Several of their creditors strenuously oppose them, and the investigation of their affairs has been as full as the imperfect books and the unsatisfactory explanations of the petitioners permitted. I have, in connection with my learned brother, the Chief Justice, carefully considered the whole case, and we concur in the judgment I am about to deliver.

The petitioners are father and son; the former had been for twenty-five years up to last month, employed as cooper and wharf-skipper by Messrs. Baine Johnston & Co.; the latter, who is twenty-two years of age, had been brought up in the dry goods store of Baine Johnston & Co., where he had served five and a half years.

In April, 1861, father and son commenced business as grocers and publicans, and so continued up to last month in partnership, the father remained in his situation with Baine, Johnston & Co. at a salary of £156 a year, and the latter managing the grocery business, keeping the books, receiving cash, making payments, and generally and principally conducting the co-partnership affairs.

They do not seem to have incurred many, if any, losses in their trade, the gross amount of their sales of goods, was estimated by Michael at from £500 to £600, and their profits were shewn to be from 12½ to 20 per cent. on such sales. They appear to have received in hard cash the sum of about £1114, including the wages of James at Baine, Johnston & Co., and how under

these circumstances they come to be insolvent, except for reckless extravagance, is not made clear to me. The petitioners are not able to throw much light upon the matter, as Michael says he has kept no debt and credit account, and does not exhibit his cash book; he has been asked for it on two days, but altho' he admits that he saw it at his house a short time ago, he says he does not know where it is, but "does not say that it could not be found." They persist in swearing that they are insolvent, and Mr. Hogsett, on their behalf, urges that it is their legal right to be declared as such. Whatever may be my own experience I do not think that there is, in proof, sufficient to qualify me in refusing their application, and accordingly this Court does hereby declare them insolvent; and here I should be well pleased to stop, but the Court is required by Mr. Carter, on behalf of several creditors, to declare and adjudge the said petitioners to be liable to punishment and to commit them to prison for fraud under the 7th section of the 25th Vic., cap. 7, passed on the 27th March, 1862, which enacts that parties who shall be declared insolvent shall be liable to punishment by imprisonment for any period not exceeding two years, for fraudulently keeping false books, and fraudulently withholding entries for them, and for having wilfully and fraudulently destroyed and purposely withheld books, papers and accounts, and for having contracted debts by means of breach of trust and false pretences, and for fraudulent conduct towards their creditors as in this case in the matter of Peter Brennan's claim.

Where the duty of finding the facts and adjudicating upon them is vested in the same person, as in the present case, it is perhaps convenient for the due administration of justice that I briefly particularize some of the salient points of the conduct of the petitioners as proved before us, which have unwillingly forced upon our minds the conviction that both the petitioners have been guilty of very gross fraud.

One of the opposing creditors, Mr. Dickinson, proves that at the end of 1862 the petitioners had fallen in debt to him £141. He sent for them, they both came and asked for time stating that they were as well able to pay 20s. in the pound as any man in the country, and that he would not be running any risk by giving them time, Dickinson required them to exhibit to him a statement of their affairs; they accordingly did so, and produced, on the 9th February, 1863, a document in the handwriting of Michael, one column of which was headed "What we are owed," and the opposite column "What we owe." Under

the latter was set down debts to the amount of £826 10s 7d, and under the former assets to the value of £1300 3s 4d., leaving an apparent surplus of £473 12s. 9d. From that statement are omitted several creditors, and in that statement of assets their stock was set down at £640, a house at £100, and furniture at £220, but no mention was made in it or to Dickinson of the fact that on the 3rd January preceding the whole of the said stock and furniture had been mortgaged to Baine, Johnston & Co., and on the 16th January preceding, the house had been mortgaged to Mr. Walter Grieve. Mr. Dickinson, relying on the fulness and truth of that statement, gave the petitioners time, and also continued his advances to them until in June, 1862; they owed him £200 when he again required a full statement of their liabilities and effects, and received from Michael, on 25th June, one headed "What we owe," shewing debts due by them £504 7s. 6d. and effects £980—without including farm or furniture, thus exhibiting a surplus of nearly £800. From this also several creditors were omitted, and Dickinson states that he was still ignorant of a mortgage or of any other creditors, and being satisfied by the statement he continued his supplies.

In September, 1863, the elder petitioner went to Mr. Robert Grieve (relying, as he stated on his connection with the house), and asked Mr. Grieve, as a great favor, if he would lend him £150, that he had one or two debts hanging over him, and that sum, he declared, would clear off his debts. Mr. Grieve required from him, at the instance of his partner, Mr. Hunter, a full statement of his liabilities, when a written statement in the handwriting of Michael, the son, was handed to Mr. Hunter by James Power on 15th September.

That statement did not mention Dickinson as a creditor at all, although he owed him over £200. And set down "What they owed" at £208 13s. 5d., whilst the debts due to the Powers was set down at £350. Grieve states that he knew nothing of Dickinson's debt, and relying upon the paper as being what he asked for, viz.: a full statement of all the Powers owed, he lent Power the £150 which James Power handed over to his son, Michael. After this interlude with Mr. Grieve the Powers return to Mr. Dickinson, to whom at the end of the year, 1863, their debt had increased to £304 2s. 4d. On Mr. Dickinson demanding payment, both the Powers came to him on the 8th January last, bringing with him a statement shewing "What they owed," £517 4s., and assets amounting to £1000. Neither

## 14 IN THE INSOLVENCY OF JAS. & MICHAEL POWER.

Baine, Johnston & Co., nor Mr. Robert Grieve (whose names had appeared as creditors in former statements) appeared in this, Mr. Dickinson enquired the reason, when James Power said Baine, Johnston & Co. had been paid off by his wages which they had stopped from him. The Powers then asked Dickinson to undertake the payment of their debts and they would assign to him their stock, furniture, house and farm, but concealing the fact that the three former were already mortgaged. This proposition, Mr. Dickinson declined, and a few days afterwards this petition to be declared insolvent was filed in schedule, to which Baine, Johnston & Co. do not seem to have been paid off, but, appear as creditors for £181. And the whole amount of petitioner's debts are sworn at £1,040, and their assets at £406, nearly reversing the state of affairs exhibited by them to Mr. Dickinson a few days previously.

I may observe that the Powers now declare that they did not give these false statements to Mr. Dickinson and Mr. Grieve with the intent to deceive, but only to shew who were pressing creditors; but I am not able to believe that statement, the reason of the thing forbids me. What conceivable benefit would it be to a party about to make advances, to be informed of some only of the creditors of him to whom he was about to give his property? Both the petitioners are too intelligent to suppose that Mr. Dickinson and Mr. Grieve only required a partial statement, and James Power expressly admits "I gave Mr. Grieve and Mr. Hunter a memorandum of all I owed and what was owed me in September; that was not a correct statement, I led them to believe that all my debts were specified in that memorandum."

And as regards the statement to Mr. Dickinson, the elder Power admits as follows:—"Understood that Dickinson's object in seeking the list was to see how we stood; we got advances from him after the statement." He had asked me for my liabilities and I desired my son to look over the book and make up an account." The Powers also deny that they told Mr. Dickinson that Baine, Johnston & Co's debt had been paid off; but Mr. Dickinson swears they did, and their own written statement supports his assertion and contradicts theirs. But no matter what they may say, it is plain to an intelligent mind, that their object was to deceive. We feel that whole of the evidence establishes beyond a doubt against the petitioners the fact that they did contract debts by means of false pretences and are subject to the penalty of the law.

Then, as against the younger petitioner who had charge of the books, who had managed the business, received the cash, and paid it away, there are the facts proved against him that he has mutilated his ledger, cutting out 19 folios, which contained accounts and burning them the same night. He says they were soiled by the upsetting of an ink bottle, but I think an inspection of the book, which does not contain a spot of ink on the tops or bottoms of the remaining leaves, discredits that statement; he says they could all be read, and I feel that the defilement of the paper is an insufficient reason for their destruction, and seeing that his cash book is not forthcoming, although twice demanded, nor his receipts nor bills of parcels, coupled with other transactions in this case, I am coerced into the belief that the leaves of the ledger were purposely destroyed with a fraudulent intent. Then again there is the transaction with Mr Brennan full of obscurity and suspicion. In none of the four statements prepared by these petitioners up to 8th Jan., 1864, does Mr. Brennan appear a creditor for any amount. By their ledger on the 19th May, 1863, he is a debtor for £95 11s. 4½d., and on the folio which contains his debt to 11th January, 1864, for the first time appears this entry on the credit side written as Michael Power admits on the 5th January, 1864, but antedated to suit a purpose—1863, June 7—Cr., by amount due £199 5s. Oct. 31.—Half year's rent, £50. Making a credit of £249 5s. to Mr. Brennan. On Michael Power being asked if he could explain how Brennan became a creditor for £199 in June, 1863, instead of a debtor for £95, he answered "I cannot explain how he became our creditor instead of our debtor. I cannot say how the credit was created, or why it was not credited at the time." Then comes the evidence of Michael as to what occurred on 26th Jan., 1864; he states that Mr. Brennan had sent for him; he saw him in his bedroom; they were alone. Brennan had a paper prepared on which he was to be acknowledged a creditor of James and Michael Power for £159 as for rent, and Michael was required to sign it. Michael stated that he told Brennan he did not owe rent, and that Mr. Brennan admitted that, but said that he wished to make it light for the Powers. Michael then signed the paper, and shortly afterwards Brennan distrained upon the same furniture that had been previously mortgaged, and had it removed to his own house, where, according to his statement, it remains unsold. Mr. Brennan denies that he admitted no rent was due, but I repeat that the whole of the proceedings above mentioned are pregnant with

suspicion as regards Michael Power, with whom we have now to deal. He confesses to having signed a paper which he knew to be untrue, and the only reference which an unprejudiced mind can draw from these facts is that the document was knowingly signed by Michael for this purpose of covering the furniture of defeating the mortgage and of defrauding the creditors.

These petitioners come before the Court voluntarily, they asked to have extended to them the benefits of the Insolvent Law—a law passed for the relief of honest debtors. This is not one of those cases in which reckless credit has been given and the Court is asked by a disappointed speculator to punish the thriftless receiver who is reduced into improvidence by the facilities afforded him of running into debt; Messrs. Dickinson and Grieve appear to have used every precaution that prudent men could take; they asked for information and were deceived by false representations. If under such circumstances, where systematic falsehood and reiterated frauds have been established against the petitioners out of their own mouths, we should or could allow their conduct to pass unpunished, it would be better that the insolvent law be repealed than be suffered to remain a mockery upon the statute book, for surely no man ought to be punished under it. We have anxiously considered whether the facts enable us to discriminate between the guilt of these parties, and notwithstanding the ingratitude as well as fraud which marked the conduct of James Power towards Mr. Grieve, we think we are at liberty to take into consideration—with a view to diminish his imprisonment—his advanced age, and the excellent character he has during his whole life, up to this transaction, enjoyed. His late master admits that until this affair he had full confidence in the elder petitioner; his avocations in life were not such as would render him so conversant with business transactions as his son, and from the manner in which both gave their evidence, I could not but feel that the father was quite as likely to be the dupe of the son as to be his adviser.

The son appears to have had full charge of the business; he received the cash, and it was his duty to account for it, he has not done so to our satisfaction. It was his province to keep books of account, and every honest trader in his position would do so; but he tells us that he kept no Dr. and Cr. account with any one. It is he who mutilated the ledger and burned nineteen leaves; it is he who has failed to produce the cash book, or the receipts, or the bills of parcels; who has expended on his mere personal expenses a sum of at any rate £80 a year, and who is

unable or unwilling to account for the large sums in money that passed through his hands during the brief period of two years and a half; he appears to have been the agent in those transactions with Mr. Brennan, and taking all his conduct into consideration on this his first essay in life, we think he has exhibited an amount of unscrupulousness which it may be a mercy to himself and a beneficial example to others to check. We adjudge therefore James Power and Michael George Power to be guilty of fraudulent conduct towards their creditors, and direct that James Power be committed to and imprisoned in Her Majesty's gaol at St. John's for the period of three calendar months from this date, and that Michael Power be committed to and be imprisoned in the same gaol for the period of six calendar months from this date.

*Mr. Hogsett* for petitioners.

*Hon. Sir F. B. T. Carter* for creditors.

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#### IN RE PARKER'S ESTATE.

1864, *March*. HON. SIR F. BRADY, C. J.

*Executor—Accounts of—Master's report on—Exceptions to.*

The Court will not countenance the idea that an accounting on the part of an executor ought to conclude, or even embarrass in any respect the rights of parties interested in the bequests of the testator.

FROM the peculiar circumstances of this case, arising partly out of the state of Mr. Simm's health when the inquiry was had into his accounts as executor, we have given a most anxious consideration to it.

First,—We are of opinion that the master has done all in his report that the evidence enabled him to do; and that the exceptions to it must therefore be overruled.

Secondly,—We are of opinion that we ought not, by confirming the whole of that report, countenance the idea that this Court accepted such an accounting on the part of an executor as one which ought to conclude, or even embarrass, in any respect the rights of the petitioner or of the family of the testator: and we will therefore leave so much of the report as relates to the account to stand for the present unconfirmed.

Thirdly,—With respect to the recommendation in the report as to the appointment of two persons to act as joint receivers, we are of opinion that it would be injudicious to confirm the report in that respect. We believe that it will be far more for the benefit of all parties that one efficient and competent person, who stands indifferent between the parties in the cause, but who will be responsible to this Court, should be receiver: and we will therefore refer the case back to the master to select a fit and proper person, unless the parties can agree upon some gentleman whom we will in that event name without further delay or expense as the person to receive the interest and income of the property of the testator, including the interest on the several mortgages and other securities deposited in Court, and bring in and place the same in the Savings Bank to the credit of this cause. The said mortgages and other securities to be in the meantime impounded in Court.

Lastly,—As Mr. Simms insists that he is entitled to set-off the consideration money in these securities as a valid disbursement of so much of the assets he is called upon to account for, and as the petitioner repudiates them as of any value beyond the amount that may be realized out of them, we desire to be understood as not doing anything in our present order to affect that question, there not being facts or evidence before the Court to enable us to adjudicate upon it.

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MANDEVILLE AND SMITH MILLS, EXRS. OF . 19  
MARGARET WHELAN, v. PINSENT,  
EXR. OF WALTER WHELAN.

1864, *March*. HON. SIR F. BRADY, C. J.

*Will—Construction of—Absolute bequest—Mere power to appoint—  
Intention of testator.*

Under his last will and testament the testator made the following bequest, "And my further will and desire is that at the death of my said wife, £80 sterling shall be at her disposal by will or otherwise to such person or persons as she will think proper." The executors of the wife claimed this sum as an absolute bequest, not to be paid till after her death; whilst the executor of the testator contended it was a mere power to the wife to appoint by will or otherwise that sum to be paid to such person as she would think proper, and she having omitted to make an appointment her representatives had no title to it.

*Held*—That the words amount to an absolute bequest, and create an absolute interest in the testator's assets to the extent of £80 to his wife or her representatives.

THE question in this case arises upon the construction of a passage in the will of Walter Whelan, deceased, the defendant being his surviving executor. The will of the testator commenced: "I give and bequeath to my dear wife, Margaret Whelan, the dwelling-house in which I now reside, together with all lands belonging or attached to the same, and all out-houses, &c., and all and singular other the property in my said dwelling-house at the time of my decease, for and during her natural life." He then directed that all his other property should be sold, and the proceeds placed out at interest, and continued: "I also give and bequeath to my said beloved wife, Margaret, eighty pounds sterling *per annum* during her natural life"; and then followed this clause upon which the question for the decision of the Court has arisen: "And my further will and desire is that at the death of my said dear wife, sixty pounds sterling shall be at her disposal by will or otherwise to such person or persons as she will think proper, and the remainder of my property, both personal and real, of every kind and nature, shall at her decease be equally divided between my nephews," &c. The plaintiffs contended that this was an absolute bequest of £60 to the testator's wife, but not to be paid or distributed until after her decease, while the defendant contended that it amounted to a mere power to the wife to appoint, by will or otherwise, that sum to be paid to such person or persons as she would think proper, and that she having omitted to make any valid appointment, her representatives have no title to it. The plaintiffs mainly relied upon the decision in *Robinson v.*

*Dusgale, 2 Vernon, 181*, which certainly cannot be distinguished from the present case: and unless we were prepared to hold that that decision was erroneous, we ought to act upon it in this case. In that case A. by will devised his land to B. in fee, paying £400—"whereof £200 to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same." The wife died intestate, and the Court ruled that her administrator should have the £200, the property thereof being absolutely vested in the wife. It was relied on for the defendant that that case had been questioned in *Buckland v. Barton, 2 Il. Bl. 136*, and so it was: but the decision in the later case did not conflict with it, because in that case an express and unambiguous power was created, and although *Robinson v. Dusgale* is nearly 200 years old it has not been overruled, and is to this day cited in books of the highest authority. The great question in cases of this kind, where the language of the will is ambiguous, is what was the intention of the testator? and unless it *clearly appear* from the language employed that a *mere power* was intended, it will be held that the property passed. In *Hixon v. Oliver, 13 Ves. 108*, there was a bequest to the testator's wife of £60 a year for life, "and the sum of £300 to be disposed of as she think proper to be paid after her death," and it was decided that she took an absolute interest in the £300, transmissible to her representative. In that case the Lord Chancellor said, "This is a question of intention which the Court can get at only by the words of the will": and he added, "that powers must be express and must be strictly construed," and also that as a power is a restraint upon property it is *never to be employed*. Moreover *Robinson v. Dusgale* was cited by counsel for the plaintiff, and referred to as an authority in support of his decision by the Lord Chancellor in that case which was decided in 1806, notwithstanding the observations made upon it in *Buckland v. Barton* in the year 1793. It is in my judgment impossible to say that the words in this will create an *express* power, or that "they clearly indicate an intention to give or reserve a power," (*1 Sug. on Pow. 118*), and such intention ought not therefore be implied. There is not in the language employed one of the ordinary expressions which are used in giving powers, such as empowering "to appoint" the fund to such persons, or in such manner or proportions, and there is this most important circumstance that there is no bequest over "in default of appointment"; omissions which strongly negative the intention that a mere power and

not an interest was intended to be given. In *1 Sug. on Powers*, 128, it is said, "If the words are ambiguous, a gift over in default of appointment will of course show that a power only was *intended* to be conferred"; and ought not the absence or omission of any such gift over, as in the present case, in like manner shew that an interest and not a mere power was *intended* to be conferred? A consideration of the whole will also shews that the testator intended to dispose of the whole of the property by his will, and immediately after the clause about this £60 he says, "and the *remainder* of my property," &c.—that is what shall remain after the £60 is disposed of—shall go to his nephews, which strongly indicates that the testator intended and believed that he had made a final disposition of this £60 in favor of his wife, merely postponing the distribution of it to the period when his nephews would take the remainder of his estate. If on the other hand it were held to be a mere power and no appointment having been made, and no disposition of the fund made by the will in default of appointment, there would be what the testator never *intended*, an intestacy as to this sum of £60; a consequence or result against which we are bound in the construction of wills always to lean. In the absence of language which would create an express power, and of language which would make provision for the non-execution of a power, it is difficult to discover a sound or substantial distinction between a will which gives (say) £60 to a wife "to be disposed of as she thinks proper to be paid after her death" (and this is the case of *Hixon v. Oliver*), and a will which says that at the death of my said dear wife, sixty pounds sterling shall be at her disposal, by will or otherwise, to such person or persons as she shall think proper," which is the case we have now to decide; or why, as all the authorities say it is not a mere power that is given, but an absolute bequest in the former case, that the same rule should not prevail in the latter case, that is in the case now before us. In confirmation of the view that the words in this will amount to an absolute bequest of the £60, I will cite a few authorities. In *1 Sug. on Powers*, 120, the law is thus laid down: "A devise of property to the discretion of A. passes the fee, and does not merely confer a power; so devise at the disposition of A. carries the fee. It is equivalent to a devise to A. to give and sell at his pleasure. There is no difference between a devise that A. shall do with the land at his discretion, and a devise of the land to do with it at his discretion." These rules of law cannot be questioned,

and laid down in respect to devise of real estate, they apply with more force to bequests of personalty, and govern this case, for surely Mrs. Whelan could "give or sell at her pleasure" this sum of £60, payable after her decease. In *re Maxwell*, a testator gave the interest of £10,000 to his son for his life, and in case of his death leaving issue the capital to be divided among his children equally, but if he should die without lawful issue, then he gave a moiety of the capital to be disposed of as his son should think proper. The son died without having any issue—Held that he took an absolute interest in the moiety of £10,000. It is difficult to discover a distinction between the disposition of the moiety in that case and the £60 in the present case. In *Alexander v. Alexander*, a testator by his will gave certain portions of his property to one of his daughters and her children; and the residue, which was the greater portion, to another daughter and her children. By a codicil he declared, "I cancel that part of my will settling on my daughters and their children my property; and my sons-in-law may dispose of the property I leave for the good of their families."—Held that the sons-in-law took absolute interests in the portions given by the will to their respective wives. These cases are to be found in *Fisher's Index for 1858*, p. 229, and strongly confirm the construction we put upon the language in this will, in holding that it gives an absolute interest in the testator's assets to the extent of £60 to his wife, Margaret Whelan, and we feel that we are now bound to decree that the plaintiffs, as her representatives, are entitled to that sum out of the assets of the testator, and that the costs of the parties should be paid out of the same.

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1864, *May*. HON. MR. JUSTICE ROBINSON.

*Executor—Refusal to produce books of estate—Unsatisfactory accounting—Absence from colony—Injunction to restrain Receiver General from paying executor his pension, and executor from selling his property.*

Notwithstanding the executor had refused to produce before the master any books of account of an estate he had managed for years, the unsatisfactory character of his accounting, his absence from the colony, and his producing mortgages as assets of the estate made to himself, the Court refused to grant an injunction to restrain the Receiver General from paying the executor his pension or to restrain the executor from selling his property, on the grounds that bail might have been obtained from him under the process of *ne exeat regno*.

(JUDGMENT on order *nisi* for an injunction on the Receiver General to restrain him from paying Mr. Charles Simms, the executor, his pension, and on Mr. Simms to restrain him from selling his own property.)

Having regard to the non-production by Mr. Simms, before the master, of any books of account (although formally demanded) in an estate which he had managed for twelve years; to the master's report of the unsatisfactory character of Mr. Simms' accounting before him, adverting also to the facts that the executor has left the colony, and that many of the mortgages he has produced as assets of his trust estate, are made to himself in his private capacity, and have not been assigned in writing for the benefit of the legatees, the judges lent a willing ear to an application by Mr. Hogsett, on behalf of such legatees, made with a view to obtain increased security, and I granted this order *nisi* for the purpose of having the matter discussed.

The will of Thomas Parker had not, on any previous argument or motion before me, been referred to, and when an application was made such as the present, very stringent in its effect and for which no precedent was cited, it became necessary to see whether, in investing the assets of the estate on mortgages Mr. Simms had been acting on his own mere motion, or under any authority from the testator. On perusing the will I find that the executor is expressly directed to "invest at interest all monies and proceeds of property realized, on mortgage security of real property or estate or in government debentures." And under this clause it became incumbent upon such executor to invest the realized assets in conformity therewith.

Whether these mortgages have been properly taken, and whether they are or are not sufficient securities for the amounts

loaned, are questions which will more properly arise at a future stage of this suit, and which I ought not to anticipate.

If, when Mr. Simms was leaving the colony, a necessity for it had been shewn, bail could have been obtained from him under the ordinary process of a writ of *ne exeat*; but no application was made for that writ; whatever other remedies the complainant may have by law, I am satisfied that at present no sufficient grounds have been laid before me to justify me in acceding to this motion, and I must therefore refuse it, and discharge the rule.

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### JORDAN, ET AL., v. JOY.

1864, *May*. HON. MR. JUSTICE ROBINSON.

*Attachment—Warrants laid under distinct attachments—Same fund—First attachment raised—Position of remaining attachment—Money in custodia legis—Present interest and disposing power—6 Victoria, cap. 10, sec. 7.*

A warrant of attachment was on the 17th of November, 1863, laid in the hands of a garnishee at the suit of one Allen against one Joy. On the 23rd of December following a like warrant was laid in the hands of the same garnishee by one Jordan against the same defendant. On the 31st of December, same year, Allen's attachment was raised, and the moneys attached paid over to Joy. It was contended on behalf of Jordan, the party to the second attachment, that the money should be paid into Court to the credit of his suit, that the money was improperly paid over to Joy, in that the moment Allen's attachment was raised his (Jordan's) attachment applied and held the money.

*Held*—That no attachment can operate on or effect any monies, on and over which the defendant shall not have at the time of such attachment *a then present interest and disposing power*. As Joy had not a present interest to dispose of the monies at the time they were attached by Jordan (being then under attachment by Allen), the raising of the attachment by the latter in no way affected the relations of Joy and Jordan.

(EXAMINATION of Thomas Murphy, book-keeper of L. O'Brien & Co., garnishee).

This case involves a question of some importance as regards the law of attachment. On 17th November, 1863, a warrant of attachment was laid in the hands of Messrs. L. O'Brien & Co. for £8 19s. 1d. sterling, on money of Walter Joy, at the suit of Samuel Allen.

On same day a like warrant was laid in the same hands, for the same amount on money of Patrick Joy, at the suit of same plaintiff.

On 23rd Dec., a warrant was laid with Messrs. L. O'Brien & Co. for £11 13s. 4d., on money of Walter Joy at the suit of Patrick Jordan & others.

On 31st Dec., Allen's attachment was raised, and by order of Mr. Stafford (one of the garnishees), against the advice of his book-keeper, Mr. Murphy, the sum of £8 19s. 1d. sterling, so attached by Allen, was paid to Mr. O'Mara as attorney of Walter Joy.

Mr. Hayward contended on behalf of Messrs. Jordan, that Messrs. O'Brien & Co. should be ordered to pay that amount into Court to the credit of Jordan's suit, because O'Brien and Co. knowingly and wrongfully paid it over to Joy, when it was attached; for that the moment Allen's attachment was raised, Jordan's applied and held the money; whilst Mr. O'Mara, on behalf of Messrs. O'Brien & Co., contended that Jordan's attachment never affected the money attached by Allen, the same being at the date of Jordan's attachment, *in custodia legis*, and beyond the control of Joy.

If our law of attachment was the same as that prevailing in London, which Mr. Hayward had cited, I should agree with him, but by the terms of the statute 6 Vic., cap. 10, sec. 7, it is expressly declared "that no attachment shall operate on, or affect any monies on and over which the defendant shall not have at the time of such attachment, a *then present interest and disposing power*." As on the 23rd December, Joy could not draw from Messrs. O'Brien & Co. the money then attached by Allen, and had not a then present power to dispose of it, I am of opinion that Jordan's attachment did not affect that sum, and I have no legal authority to order it to be paid into Court.

Then remains the question whether any money or property of Walter Joy was attached by Jordan.

Looking at the whole of the evidence I think I shall be acting properly in directing that the sum of £8 2s. 4d. currency, be paid into Court to the credit of this cause, leaving it to those concerned to move the Court on sufficient affidavits, that it be paid out to the party who may shew himself rightfully entitled to it.

The book-keeper in his examination before me on the 20th instant, stated that on the 23rd December about £18 were on Messrs. L. O'Brien & Co's. hands, belonging to Walter Joy, and

more than sufficient to satisfy Jordan's demand, although on his examination by Mr. O'Mara, he stated that part of Walter Joy's balance was claimed by Patrick Joy. And Mr. Michael Stafford states that of the balance of £18 9s. standing to the credit of Walter Joy, £14 5s., was for oil which Patrick Joy delivered in, and which was erroneously credited to Walter.

I am not satisfied of any such error, and I think that, so far as the evidence goes, the garnishees must be held to their own entry.

Patrick's claim was known to Mr. Stafford before any attachment was raised, and if it was *bona fide*, only £4 5s. would be due to Walter Joy. Yet, I find Mr. Stafford, on the 31st Dec., pay Walter, £10 6s. 7d. currency, in spite of Mr. Murphy's advice. Again, if Patrick really delivered to a wealthy firm like Messrs. O'Brien & Co., oil to the value of £14 5s., why should he accept £8 2s. 4d. in full for that oil? as his receipt put before me shows he did; and not only so, but undertake to indemnify Messrs. O'Brien & Co., for paying him at all. For these reasons I am by no means satisfied that the oil did not belong to Walter, and that the name of Patrick was not used as a cloak to defeat Walter's creditors, and I therefore order £8 2s. 4d. currency, to be paid into Court to abide further order.

*Mr. Hayward* for Jordan.

*Mr. O'Mara* for the garnishee.

## BEMISTER v. HUNT & HENLEY.

1864, *May*. HON. SIR F. BRADY, C. J.

*Costs—Judgment by default—Brief fee—When it attaches.*

When at the time of taxation a judgment by default remains undisturbed the brief attaches.

In this case the following question of costs arose. Plaintiff (the Receiver General) attached defendants' vessel to answer an action upon a bill of exchange for duties. One Prowse gave bail and released the vessel. The writ was served on Prowse, who did not appear for the defendants in the action, but a judgment by default went against them. Attorney General then took out a rule *nisi* to compute principal and interest.

which was served on Prowse, who came in with an affidavit and denied being defendants' agent to make him liable to receive process for them under the Attachment Act, and the Court declined to make the rule absolute upon the evidence then before it. Defendants afterwards agreed to pay debt and costs, and on taxation Mr. Carter for them contended that the brief fee should not be taxed. The question was submitted to the Court, and it was decided that without going further into facts, as there was a judgment by default undisturbed at the time of taxation, the brief fee attached and must be taxed.

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## WHITE v. NFLD. MARINE INSURANCE CO.

1864, *May*. HON. SIR F. BRADY, C. J.

*Policy of insurance—Time policy—Insurance for voyage only—Warranty of seaworthiness.*

In a policy of insurance effected for a voyage the law implies a warranty on the part of the assured which amounts to a positive undertaking that the vessel, at the commencement of the voyage, is seaworthy. But this rule does not extend to a time policy.

THE action was brought for the recovery of the sum of £80 and interest thereon from the 16th day of January last. The plaintiff was owner of the boat *Polly*, which was insured by the defendants on a time policy from 12th October until 20th November last, and lost while on a voyage from Fermeuse to St. John's on the 4th of November, she being at the time named under a written agreement to Richard Molloy and five others.

The plaintiff, Richard Molloy, and Michael Bryne were examined as witnesses for the plaintiff, and Messrs. E. L. Jarvis and C. Jarvis witnesses for defendants.

The facts of the case fully appear from the charge of His Lordship the Chief Justice to the jury, which was to the following effect:

He felt that it was necessary for him to make but few observations, for the jury were fully competent to deal with the questions of fact which were submitted to them. It was not requisite for him to remind them that they must look upon this policy of insurance as they would upon a contract between two individuals. In such cases there had been observable too

frequently a prejudice adverse to public companies, and Courts had found it necessary to caution juries against allowing any undue influence to operate upon their minds. He was happy to say that in this case there was no broad allegations of fraud against the plaintiff. In view of that he had asked Mr. Jarvis questions, the answers to which had relieved this case from any charge of wilful dishonesty or misrepresentation; and Mr. Jarvis had also said, "We always told the plaintiff that we never imputed to him any intentional loss of the boat." It appeared that the plaintiff bought the boat (the *Polly*) about four years ago; that Messrs. P. & L. Tessier were his supplying merchants until last year, and having a claim, as was frequently the case when such relationship existed, upon the boat, they had insured her until last year in £150 for their protection; that plaintiff was employed with this boat in the spring of 1863 by the defendants in endeavoring to raise the wreck of a vessel in the narrows. The fact of Mr. Pitts, the surveyor for this company, having then gone on board of her is not of much value, as he merely went there to see the wreck which had been recovered and not for the purpose of surveying the boat; that plaintiff afterwards went with the boat to Petty Harbor fishing, and subsequently had her under the agreement which had been given in evidence to Molloy and five others to prosecute the fishery on the Southern coast; that plaintiff continued at Petty Harbor fishing until the 3rd or 4th of October, when he came to St. John's and applied to Mr. Jarvis, agent of the defendants, to have his boat insured. The plaintiff it seemed answered the questions put to him; stated it was the same boat which he had in the spring about the wreck; shewed his former policy effected by Messrs. Tessier in the St. John's Marine Assurance Company, and referred Mr. Jarvis to Mr. Ewen Stabb from whom he had purchased the boat, and was surveyor of ships for the other company. The change of insurance from one office to the other seemed only to have arisen from the Saint John's Marine Assurance Company having discontinued business. The insurance was afterwards effected for the sum of £80, from the 12th of October to the 20th November last, the boat being then at Fermeuse. She left there on the 4th of November about one o'clock, a.m., after, as the witness says, the moon was in order, that they might have the day before them for their voyage to St. John's. It was then blowing a moderate breeze, which increased to what the witness termed a "wholesome breeze" and a heavy ground swell. About six

o'clock she sprung a leak, from which she rapidly filled with water; the master and crew abandoned her, and about fifteen minutes afterwards she sank. It was quite true that when an insurance was effected for a voyage, the law implied a warranty on the part of the assured which really amounted to a positive undertaking on his part, that the vessel at the commencement of the voyage should be seaworthy and fitted in every respect to perform such voyage, having due regard to the nature of it; for a voyage across the Atlantic was very different from a short coasting voyage. But the law also said that this rule did not extend to a "time policy." In a "time policy" there was no guarantee on the part of the assured that the vessel was seaworthy, but she is presumed to be so and the plaintiff is not bound to establish that fact. That presumption, however, was open to be rebutted, and the question for the jury to consider was whether, looking fairly at the evidence, the nature and length of the voyage contemplated, the period of the year, the conduct of the master and crew, they were satisfied that the boat was not in a condition to perform the voyage, and that the master and crew knowing that she was wholly unfit for that purpose, left Fermeuse for St. John's. If so, then the plaintiff was not entitled to recover.

Upon the second ground of defence, his Lordship agreed with every word which had fallen from the learned counsel for the defendants, that the best good faith should be observed in these contracts, and it was for the jury to consider whether the plaintiff, when he applied to effect this insurance, had withheld any material fact, which, if stated, would have been considered to increase the risk and would have induced the defendants to change the term of the contract. If the jury found such to be the case, they are bound to find a verdict for the defendants. Upon this branch of the case, there was a conflict of testimony between the plaintiff and Mr. Jarvis; this was a matter for their consideration. If the jury find on both these questions, in favour of the plaintiff, they should give him a verdict for £80, with interest from the 16th January. But if, however, they found, on either of these questions, in favour of the defendants, they were bound to give a verdict for them.

Mr. Whiteway took exception to the part of his Lordship's charge, where he said that if the jury believed the boat was not in a condition to perform the voyage, and that the master and crew, knowing that she was wholly unfit for that purpose, left Fermeuse for St. John's, the jury should find for the defendant,

upon the ground that the master's act in this case could not bind the plaintiff, inasmuch as the master, Molloy, was the hirer of the boat, and as such he was owner, *pro hac vice*, and not the agent of plaintiff. His Lordship noted the objection.

The jury found a verdict for the plaintiff £80 currency, with interest from 16th January last, £81 10s. currency.

*Mr. Whiteaway* for plaintiff.

*Attorney General* for defendant.

## WALSH v. ST. JOHN.

1864, *May*. HON. MR. JUSTICE ROBINSON.

*Contract—Deed insensible—Absence of schedules—Practice—Examination of witnesses—Mode of.*

An agreement as a deed is from the absence of schedules (such as plan and specifications in a building contract) insensible.

There is no authority to support the practice of the opposite counsel interposing by asking questions during the examination of a witness.

THIS cause was tried by a special jury. It was an action upon a building contract brought by the plaintiff to recover compensation for carpenter's work done about two houses of the defendant's. The case was devoid of public interest, but some nice points of law arose during the trial.

The plaintiff sought to recover upon the common counts, while the defendant relied upon an agreement under seal by which the work contracted for was to be done according to certain plans and specifications, and the defendant was to be liable to pay only in the event of the work being approved of by an inspector to be appointed by him, and who (Mr. Neville) was afterwards appointed, and it was contended that the plaintiff should be non-suited, those conditions not having been complied with, the work not being according to plans and specifications, and having been disapproved of and altered. And the defendant's case was that besides having paid more monies on account than the work was worth, that the expense attending the alterations and the damage resulting from the plaintiff's breach of contract, far exceeded any claim for the work done.

The case occupied this day and the following day, and many witnesses were examined.

In the course of plaintiff's examination, defendant's counsel interposed with a question, "Whether the terms regarding the work for which plaintiff claimed had been reduced into writing?" Plaintiff's counsel objected to the examination being interrupted, as so far his course of examination was regular, as the claim was for work and labor, and that the question should be reserved for cross-examination.

The Court held that while the system of interposing was the ordinary and generally convenient course, yet as no authority could be shewn for the right to interrupt, the evidence of the plaintiff should proceed.

On cross-examination then the agreement under seal before referred to was shewn to have been executed, but no plans or specifications were attached, and it was in them that the work to be performed was described.

After argument the Court held on the authority of *Weeks v. Maillardet*, 4 *East's Reports*, that the agreement as a deed was from the absence of the schedules insensible, and that the plaintiff had made out a case for the jury.

Then there was a conflict of testimony as to the specifications by which the work was to be done.

Mr. Justice Robinson summed up. His Lordship referred to the conflict of testimony which was so usual in cases of this nature. The jury were not to look at the case through the medium of either the plaintiff's or defendant's views. If they found that the plaintiff entered into an agreement to do specific work at a specific price he should be bound by it.

The learned judge referred to the evidence and the conflict of testimony as to the specification. The plaintiff had as his lordship considered abandoned the contract without sufficient reason, and any cavils or exceptions of the defendant afforded no justification, and if the jury were of the same opinion they should allow so much of the defendant's set-off as he had established to their satisfaction, and from the contract price of £90 also deduct the expense to which the plaintiff was put in changing any work which he was justified in altering and in completing the remainder of the contract, and the deductions should be made according to the character of the work originally intended. The learned judge here referred to the faults and alterations relied upon, and if after crediting the plaintiff with the contract price and any extras in the manner he had

pointed out, and debiting him with established item of set-off and deductions for expense in altering and completing the work, there was a balance in favor of the plaintiff the jury should find for that amount; and if, on the other hand, the plaintiff were in debt they should find for the defendant.

Verdict for the plaintiff, £15.

*Mr. Pinsent* for plaintiff.

*Attorney General* for defendant.

## QUEEN v. CRUICKSHANK. QUEEN v. THOMPSON.

1864. *July*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

*Recognizances—Estreat—Escape—Non appearance—11 & 12 Victoria.*

The Supreme Court has jurisdiction in proceedings for estreating recognizances.

By 11 & 12 Victoria the prescribed notice must accompany the bond.

There can be no breach, if in the condition of the bond, no legal offence is set out.

*The Queen v. Cruickshank.*—Ex parte the bail, Mr. Carter for them.

*The Queen v. Thompson.*—First case, ex parte the bail, Mr. Pinsent for them.

*The Queen v. Thompson.*—Second case, ex parte the bail, Mr. Pinsent for them. These were the bail cases referred to in our former reports in which the Attorney General for the Crown took out rules *nisi* to estreat the recognizances on account of the non appearance and escape of the defendant. The learned counsel for the bail contended that there was no such proceeding as estreat known to the constitution of the court, and they took many special exceptions.

The exceptions succeeded in the two first cases (the first point that of jurisdiction being overruled in all). The exception that prevailed in the first case was, that the notice prescribed by the statute 11 & 12 Vic. did not accompany the bond. In the second case, that in the condition of the bond there was no legal offence sufficiently set out, and therefore no breach.

In the third case there was no filed exceptions to the proceedings, but the Attorney General at the suggestion of the Court having referred to the escape of the others, that there was no collision on the part of the bail, and the fact that these were the first adjudicated cases upon the points raised, did not further proceed.

1864, *July*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

*Attachment—Warrant—Cheque—Destruction of cheque by garnishee  
at instance of drawer.*

A warrant of attachment was laid by the plaintiff in the hands of the garnishee (one Mare), who held a cheque drawn in favor of defendant by one Munn. Previous to laying the warrant the defendant had no communication with the garnishee, but shortly after the laying of the warrant the defendant did see the garnishee, who told him he would pay amount of cheque if it had not been attached. Shortly after Munn disregarding his having drawn the cheque, paid the defendant the amount of it and requested the garnishee to destroy same, which he accordingly did. On a rule *nisi* for an order on garnishee to pay amount of cheque attached into Court—

*Held*—The cheque was the effects of the defendant in the hands of the garnishee, and therefore liable to attachment.

IN this case Mr. Little for the plaintiff applied for an order on Mr. William H. Mare to pay into Court a sum of ten pounds currency, alleged to have been attached in his hands in this case.

The grounds of the application as they appeared by the notes of Mr. Justice Little, before whom the agent of the garnishee had been examined under the usual order, were that on 25th May a warrant of attachment in the cause was laid in the hands of Mr. Mare, who at that time held a cheque for £10, drawn and sent by Mr. John Munn for delivery to the defendant in discharge of a debt due by Mr. Munn to him; that before the receipt of the cheque and before the laying of the warrant of attachment, the defendant had held no communication with Mr. Mare, but that shortly after the laying of the warrant he called for his money, and was then told by Mr. Mare, who expressed his readiness to pay him but for this hindrance, that he could not then pay him as the money was attached; that Mr. Mare then at defendant's request gave the defendant a note to be shewn to Mr. Munn, informing him that the cheque had been attached, and a few days afterwards he received a telegram from Mr. Munn stating that the defendant had been paid and that he should destroy the cheque, a direction with which Mr. Mare appears to have complied.

Under these circumstances Mr. Little contended that the warrant bound the cheque in Mr. Mare's hands, and that Mr. Munn's order to Mr. Mare to destroy it was a mere attempt to evade the process of this Court, and ought not to have been obeyed.

Mr. Whiteway, citing Brandon's law of attachment, contended on behalf of Mr. Mare that no promise or assent having been given or made by Mr. Mare to the defendant to hold the cheque for his use after the receipt of the cheque and before the attachment, there was no such privity between these parties as would enable the latter to sustain an action for its recovery from the former.

The judges, on different grounds, are of opinion that Mr. Mare should be ordered to pay the cheque or its value, if destroyed, into Court, to abide the order of the Court in this cause; Mr. Justice Robinson on the ground that as Mr. Mare's agent expressly acknowledged that Mare held the cheque for Nowlan, and would have handed it to him but for the attachment, it is sufficiently plain as against the garnishee, that the attachment bound it, and being thus subjected to the paramount authority of the Court, the cheque must continue for as much as it is worth, subject to the order of the Court, but Judge Robinson reserves his opinion upon the right of the drawer of a cheque to revoke it, or stop payment of it, either at the bank or in the hands of his agent, for sufficient cause, at any time before actual payment or *bona fide* assignment, or as to whether there is shewn to have been any promise valid in law, from Mare to Nowlan, which would support an action by the latter against the former, which points it is not necessary now to decide, and upon both of which fuller information is desirable.

Mr. Justice Little and the Chief Justice on the ground that although as a general rule, where A sends money to B, to pay to C, no action will lie for the money by C against B, until B has expressly or impliedly promised C to pay it to him, yet that the prior conditional promise of Mr. Mare was equivalent in law to a subsequent absolute one, and would sustain an action for the recovery of the cheque by the defendant against the garnishee, that the cheque was therefore effects of the defendant in the garnishee's hands, and consequently liable to attachment in this suit.

Let a rule be made upon Mr. Mare to pay into Court the cheque, or its value £10 cy., to abide the order of the Court in this cause.

*Mr. Little* for plaintiff.

*Mr. Whiteway* for garnishee.

1864, *May*. HON. MR. JUSTICE LITTLE.

*Patent—Invention by servant—Grant of Patent to servant—Infringement by master.*

Where a skilled person is employed to make experiments the result of his labors belong to his employer, and the adoption and use of the invention by the employer is no infringement where the invention has been patented by the employee.

THIS was an action for the infringement of a patent right, for improvements in the manufacture of manure.

The case for the plaintiff was that in 1860 he obtained a patent for the new and useful invention of converting seal and other fish refuse into a useful manure, by the application of sulphuric acid and other means.

In 1862 he took out another patent for improvements in the mode of manufacture, and in 1864 he took out another patent for still further improvements to make, in the words of his counsel, "a complete article in manure."

It was for infringement of this third patent that this action was brought, and the main improvements introduced under this patent were not pressing by means of steam or otherwise, and the use of dry ground bones as an absorbent and fertilizer, instead of bones dissolved in vitriol and thrown wet into the mass, as in the former process.

The trial occupied two days, and although of quite a novel character in our Courts, was not of an especially interesting nature, except to the parties concerned and to the agricultural mind.

Mr. Justice Little summed up :

His Lordship read the declaration and the plea, which was that of the general issue under the statute. There appeared to be a strong feeling between the parties, but with that they had nothing to do. The duty of the jury was to determine the case under the law and the evidence applicable to it. It was necessary for the plaintiff to prove all the allegations of his declaration, that the invention was a new and useful one, that the plaintiff was the first inventor, and that his specification was sufficient in law. The chief point of conflict in this case was—Who was the discoverer? To prevent abuse in the granting of patents, the protection the law afforded was strictly watched; and with reference to the position taken up by the learned counsel for the defendant, His Lordship would remark,—First, as to the plaintiff being defendant's servant at the time of the alleged discovery, and that the improvements were at his cost and ex-

pense. The law was this, that if a skilful person be employed to make experiments, the result of his labors will belong to his employer, and if the master plans and the servant adopts with alterations, the property in improvements is the employers.

As to obtaining his knowledge and information from a third person, if that were so the patent to Fox would be invalid. And still stronger was the case where, as the defendant in this case says, the invention of the improvements was his and derived from him. The first patent, it appears, was the property of the defendant by purchase from assignees of the plaintiff, and it was for the use of the improvements in the manufacture patented in 1864 that the action was brought; and the last position taken by the defendant was that the last patent could not be used without infringing the first, and that it embraced some of the substantial provisions of the first. The law was that the later patent must be confined to the addition, and that if the grant extend to the whole it is invalid.

The point of infringement as alleged by the plaintiff is the application of ground bones to the manure in the heap since the plaintiff's patent of July, 1864; and that, prior to that, such application had not been known or used.

The plaintiff, up to January, 1864, had been defendant's manager of the works under the first patent, and as defendant contended, had made use of his knowledge of the improvements suggested and carried out by him to obtain a patent for them; and it was for the use of those improvements during the past season that the plaintiff brought this action.

His Lordship read the evidence directed to this point. If the evidence of Fox were believed, and he had satisfied the law in other respects, there should be a verdict for the plaintiff; but if they believed the defendant and his corroborative testimony, they should find for the defendant.

Verdict for defendant.

*Attorney General* for plaintiff.

*Mr. Pinsent* for defendant.

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1864, May. BY THE COURT.

*Executor—Irregularity in accounts and management of assets—Master's report—Petitioner's costs.*

In consequence of the unsatisfactory manner in which the estate had been managed and the accounts of the same kept, showing irregularities in the investment of the assets of the estate, which necessitated proceedings before the Court, the executor was ordered to pay the taxed costs of the petitioner or plaintiff out of his private estate.

THE ascertainment of the balance due upon the account filed by defendant has been referred to us under the following memorandum of agreement made between George J. Hogsett on behalf of the widow and children of the late Thomas Parker of the one part, and Daniel W. Prowse on behalf of Chas Simms, executor of the said Thomas Parker, of the other part, whereby the said Daniel W. Prowse, for his principal and in his name, agrees to pay in full of all claims on him in relation to the said estate of the said Parker, the amount appearing by the said Simms's account to have been received by him on account of the said estate, with interest from the time of receipt at five per cent. per annum on the amount appearing due from time to time, after crediting the several sums appearing by the said account to have been paid by the said Charles Simms; said George J. Hogsett agreeing on behalf as aforesaid to accept the amount in full discharge and satisfaction of all claims upon said Charles Simms by the said widow and children. The amount received by the said Charles Simms to be stated by the Court from the account aforesaid. And it is further agreed by the said parties that all questions relating to the payment of costs by either party, and also the liability of the said Thomas Parker's estate to pay the said Charles Simms the balance appearing due to him by his said account and the master's report, and of the amount aforesaid, shall be left to the decision of the Supreme Court, and all these matters to be final and binding on the said party.—H. W. HOYLES, GEORGE J. HOGSETT.

To aid us in an investigation of the imperfect and complicated accounts filed by the defendant, and of the state of the accounts under the terms of the above memorandum, we referred them to the master for his report thereon, and he has made the following report for our information :

I beg to report that the principal monies mentioned in the account annexed, marked A, were received by Mr. Charles Simms as executor of the said estate on the dates set opposite each sum respectively, and that the

interest therein mentioned is calculated at the rate of five per cent. per annum for such dates and on each sum respectively to the tenth day of November, A. D. 1864. And that the amount to be paid by the said Charles Simms to the representatives of the said estate is two thousand six hundred and ninety-four pounds five shillings and eight pence currency. In fixing the seventh day of February, 1852, as the date from which interest should commence on £930, I have been governed by the fact of that being the date when the two executors (Simms and Parker) first appear to have loaned monies of the said estate. Thomas Parker died on the 19th June, A. D. 1851, and that date I have fixed as the date of the receipt of the two sums of £1000 and £31 10s. 2d., as it appears that Brooking & Co. must have had £1000 at that time from the circumstance of their being paid interest from thence until they repaid the principal in 1857, and from a similar circumstance I infer that the £31 10s. 2d. was in the Savings Bank at the time of Thomas Parker's death. The £320 18s. 6d. is stated to have been received in 1857, but there is no further evidence of the date and I have fixed the middle of the year, the first day of July. I further report that Charles Simms is not entitled to the balance apparently due him by my former report; these balances arose on a statement of account first shewing principal monies received and invested, secondly shewing interest *actually received* (not which ought to have been received) and monies paid to Mr. Parker. These statements are now rendered unnecessary by the agreement of the parties, all which is humbly reported.

W. V. WHITEWAY, Master in Chancery.

This report has been shewn to Mr. Hogsett on the part of petitioners, and to the Attorney General on the part of the defendant, to see if there were any clerical errors in it, and no objection has been taken to it by Mr. Hogsett, but the Attorney General has objected thereto for reasons given by him, which we have considered and for which we are of opinion there is no solid foundation. Having fully considered the petition, answer, and all matters referred to us, and examined all the documents in relation thereto, we hereby declare and decree that the sum of two thousand six hundred and ninety-four pounds five shilling and eight pence currency is justly due and owing by the said Charles Simms, as executor of the will of the late Thomas Parker, to the estate of the said Thomas Parker, to be paid pursuant to the recited agreement by the said Charles Simms, in full satisfaction of all claims upon him by the said widow and children of the said Thomas Parker. And that sum shall be paid by the said Charles Simms to said Johanna Parker, or into this Court, to the credit of the cause or matter on or before the tenth day of November next, and that security be given in the meantime pursuant to Mr. D. W. Prowse's undertaking in his note of the 14th June last. And in consequence of the unsatisfactory manner in which the estate has been managed and the account of the estate has been kept and

submitted to the Court, shewing irregularities in the management of the assets which necessitates this proceeding, we further order and direct that the petitioner's costs in this cause be referred for taxation, and when taxed and ascertained that the monies shall be paid by the said Charles Simms to the petitioners. And pursuant to the prayer of the petition filed in this cause, and to the master's report dated 26th of November, 1863, we hereby appoint the said petitioner, Johanna Parker, guardian and receiver of the said estate, upon her giving good and sufficient security, and we decree that her receipts shall be sufficient discharges of all the said amount so due as aforesaid by the said Charles Simms, and the cost in these proceedings when paid, and that she do give sufficient security to this Court in accordance with the said last mentioned report for the due discharge of her duties as such guardian and receiver, and this we declare to be the judgment of the Court pursuant to said agreement on all the matters referred for our decision.

*Mr. Hogsett* for plaintiff.

*The Attorney General* and *Mr. D. W. Prowse* for defendant.

## G. C. RUTHERFORD v. EDWARD PIKE.

1864, *May*. HON. MR. JUSTICE LITTLE.

*Bill of Sale—Setting aside of—Intent to defraud creditors—Void—Insolvency law—Undue preference to creditors.*

Under the Insolvency law of the colony such deeds are void as are given to secure undue preference to creditors.

THIS suit has been instituted for the purpose of setting aside a bill of sale of a vessel called the *Glide*, executed by one Ambrose Pike on the 22nd October, 1862, to the respondent, who is his father, and of declaring petitioner to be the owner of one-half that vessel. It appears that petitioner is his brother.

Andrew Rutherford, who carries on business in Harbor Grace as merchant, agreed in January, 1861, to supply the said Ambrose Pike, for the prosecution of the fishery, upon the condition that as he had then neither means or credit, respondent would convey to him one-half of the said vessel, then owned by re-

spondent. The petition alleges that after some negotiation, the respondent agreed to this arrangement, and delivered to Andrew Rutherford a bill of sale from respondent to the said Ambrose Pike, of one-half the said vessel in accordance with that agreement. The supplies required by Ambrose Pike were then issued by petitioner and his partner; the necessary transfer of one-half the vessel was not made in the Custom House books until the October following. For the purpose of effecting that object Ambrose Pike made the usual declaration as owner of one-half the vessel, before Mr. Brown, the sub-collector at Harbor Grace. The Custom House authorities at St. John's, by mistake, issued a register of the whole of the vessel instead of the half, in the name of Ambrose Pike. He and the respondent participated equally in the profits of the vessel, from the time of the transfer of half of her until the latter part of October, 1862, when Ambrose Pike, having fallen in debt to the Rutherford's in the sum of £178—they requested him to execute a mortgage on his share of the vessel, to secure the debt, which they say he promised to do but immediately after that it is charged that he privately and fraudulently without any valuable consideration and with the fraudulent connivance and assent of the respondent, and with the object of securing to him a fraudulent preference to other creditors, and defeating the just claims of the Rutherfords and other creditors of his executed a bill of sale of the whole of the said vessel, to the respondent, on the 22nd of October, 1862. In the month of December following, the said Ambrose Pike was declared insolvent, and Mr. Lewis Emerson was appointed trustee of his estate and having put up to auction the interest of the insolvent in the said vessel, it was purchased by the petitioner, who thereupon became the registered owner of one-half of her. The respondent refused to acknowledge any right in the petitioner to a share of the vessel, and alleged that he never executed a bill of sale to Ambrose Pike of any share of the vessel, and that the document proposing to be such conveyance was a forgery, and had not been executed or delivered to him that he had only agreed to give his son one-half of her earnings, and not one-half of the vessel, and that he took the re-conveyance from Ambrose to himself to provide against the effects of the alleged forgery. The question as to the execution of the bill of sale by the respondent to Ambrose Pike was first contested in the Vice-Admiralty Court, and referred to this Court for a fuller investigation, and final adjudication. The whole case turns upon this point, and the evidence upon it has

been of the most conflicting character, making our duty no less difficult than painful to discriminate the truth from the falsehood by a regard to all the circumstances established in proof, and the credibility which we felt ourselves warranted in attaching to the evidence upon which our judgment is based. The petitioner has proven that a blank bill of sale was filled up in his office of one-half the vessel from the respondent to Ambrose Pike according to the agreement before mentioned, that it was given to the respondent for the purpose of examining it, that he took it away with him, and after some days brought it back to the Rutherford's with the signature "Edward Pike," subscribed opposite the seal at the foot of it, that he acknowledged it as his act and deed, and delivered it then and there to Andrew Rutherford, who signed his name to it as a witness. The evidence of the petitioner, and his brother Andrew, in support of this transaction is sustained by their two clerks, McRae (since dead) and Balmer, the former of whom clearly proves that the respondent acknowledged in his presence the execution of the bill of sale, and the latter gave confirmatory testimony in support of it. The sub-collector at Harbor Grace proved Ambrose Pike's declaration before him of his being the owner of one-half the vessel in October, 1861, and Mr. John Hayward swore that in October, 1862, when he was acting as the attorney of the Rutherford's, Ambrose Pike made him a promise that he would give them a mortgage on his half of the vessel, to secure the debt he owed them. The case thus made out on the part of the petitioner, was met by the positive swearing of the respondent, that he never agreed to execute, and as a fact never did execute that bill of sale to Ambrose of half the vessel, that he never signed his name to it, that Andrew Rutherford wrote something on it, and showing it to respondent the latter observed his name at the foot of it while the ink was yet wet, and Rutherford asked him to put his mark to it which he refused to do. Ambrose Pike by his testimony supports his father's version of the affair by swearing that he was to have only one-half the earnings, and not the property in the vessel, and he denies that he understood the declaration of ownership which he made before the sub-collector, and that he made any such promise as that proven by Mr. Hayward in relation to a mortgage of his interest in the vessel. It appeared on both sides to be admitted that the name of the respondent, at the foot of the bill of sale, was not written by himself, but it equally well appeared that he was in the habit, although able to write, of getting other persons to sign

his name to receipts and other documents. The respondent does not pretend that the object of the bill of sale in question was simply intended to secure his son in half the vessel's earnings, but he repudiates it altogether, while he has not attempted to show the existence of any document to secure the son in half the vessel's earnings: and it clearly appears from the evidence of Mr. Munn, with whom he dealt, that he showed him the bill of sale in dispute before it was signed, for the purpose of asking his opinion on the propriety of his giving it, and although in accordance with Mr. Munn's advice, he said to him he would not sign it, he likewise observed to him that he, Mr. Munn (to whom Ambrose then owed about £500) would not supply Ambrose, and what was he to do—which clearly showed the interest the father naturally took in obtaining supplies for his son. In his own evidence he admits that he said to the Rutherford's, after they had agreed to supply the son, "Now, you are going to supply him, I hope he will make a good voyage," while they positively swear, and the circumstances confirm their swearing, that they would not give Ambrose supplies on his own credit, unless the respondent made over half the vessel to him.

Without entering more minutely into a detail of the elaborate evidence, which we have had to consider, we have come to the conclusion after a careful review of the whole of it, with a most anxious desire to arrive at the truth, that the petitioner's statement of the transaction in question is correct, and that the evidence of several witnesses in support of the bill of sale from the respondent to Ambrose Pike, clearly establishes the validity of that document, and that although the respondent did not sign his name to it, he got some other person to write his name, and he delivered the document as his act and deed, which was quite sufficient in point of law. The Rutherford's leave this Court without the least imputation on their integrity and truthfulness. The next question that we have to dispose of is upon the effect of the bill of sale from Ambrose to the respondent. It was contended by the Attorney General that having been given with intent to defraud creditors it is void under the local insolvent act, or the statute of Elizabeth against voluntary conveyances, or at common law. We think that there is a manifest defect in the insolvent act in relation to such cases, for it only makes such deeds void as are given to secure an undue preference to any creditors, whereas it does not appear in this case that the respondent was a creditor of Ambrose Pike; while there is no doubt that the bill of sale was given with the intent of defraud-

ing his creditors of his interest in the vessel at the time that he was actually insolvent, and that the respondent was aware of such intent and of his son's insolvent circumstances when he took that bill of sale. By the 13th Elizabeth, cap 5, sec. 2, it is enacted that every gift, grant, alienation, bargain, and conveyance of land, tenements, &c., goods and chattels, &c., made to or for the purpose and intent to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c., shall be thenceforth deemed and taken (only as against that person or persons whose actions, &c., by such guileful or fraudulent devices or practices are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect, any pretence, color, fair consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. It being clear, according to the evidence, that this conveyance was made by Ambrose Pike, not only when he was insolvent, and when the Rutherford's were pressing him for security of the debt but without any consideration passing from the respondent, and that he was aware of these facts, there can be no doubt that it was executed with the intent to delay, hinder, or defraud the Rutherford's of their debt, and is therefore void under this statute so far as it affects the one-half of the vessel previously conveyed by the respondent to Ambrose Pike; and we therefore decree accordingly, declaring the petitioner entitled to one-half the said vessel, and to participate in the control, possession, and profits therefor, from the 22nd May, 1863, being the date when he became the purchaser thereof from the trustee of the estate of the said Ambrose Pike. Let a decree therefore issue accordingly and an account be taken of the said profits by the master, and we declare the petitioner entitled to the costs of this suit, to be taxed by the master and reported to this Court. This cause is reserved for further directions until the master presents his report.

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1864, *May*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

*Practice—New trial—Misdirection—Obstruction of access to wharf from harbor—Public nuisance.*

Where in an action for damages for obstruction of access to wharf from the waters of the harbor, the presiding judge directed the jury "that as from the evidence it appeared the plaintiff did himself (some years previous to the date of the alleged trespass), by extending his wharf, obstruct the access to his premises, and if they believed that he thereby substantially contributed to the injuries done to his premises by the subsequent acts of the defendants, that would be a good ground of defence." Upon a rule for a new trial—

*Held* (Robinson, J., differing)—Such direction was wrong in point of law.

A private individual cannot justify an injury to property in the possession and enjoyment of another upon the mere ground that such property was a public nuisance.

IN this case the plaintiff complained that having been in the possession and enjoyment of certain waterside premises for some years, to which he had access over and through the waters of the harbor, the defendants by putting or sinking their barge in the said waters near to the plaintiff's premises, lessened and obstructed the access which he (the plaintiff) had previously enjoyed, whereby he was deprived of the benefit and enjoyment of the premises. The defendants pleaded that they were not guilty. On these pleadings in ordinary cases I apprehend the simple issue for the jury would be whether the defendants did the acts complained of: and if so, whether they thereby obstructed or lessened the access the plaintiff had previously used and enjoyed, and thereby caused an injury to plaintiff; and if so, to find a verdict for him for such an amount as they would deem sufficient compensation for that injury. That course would also appear to be the obvious one to adopt in this case, as the wrongful acts of the defendants were hardly in controversy: but my brother, Judge Robinson, before whom this case was tried, took a different course. There was evidence given at the trial that the plaintiff, some years previous to the acts of the defendants of which he complained, did himself, by extending his wharf into the waters of the harbor, to a certain extent obstruct and lessen the access to his premises which he had enjoyed prior to such extension, and the jury were directed that if they believed he thereby substantially contributed to the injuries done to his premises by the subsequent acts of the defendants, that would be a good ground of defence to the action, and they should find for the defen-

dants. The direction was, in my judgment, wrong in point of law. If a party for his own purposes, his own convenience and advantage, makes some alteration in his premises, the effect of which is to curtail and diminish the water easement and water privileges he previously enjoyed, how, in law or in reason, is that to justify a stranger in afterwards committing acts whereby that easement is curtailed and diminished as much again, or the access to the premises wholly obstructed. Suppose the owner of land adjoining a river, to the use of the waters of one-half of which he was entitled, finding that the full body of the water was too powerful for his machinery, or for whatever purposes he may require the water, diverts one-half of it, and to that extent curtails and diminishes his water privileges, and a stranger comes and diverts the remainder, can he justify doing so and thus destroying the property of the owner by saying to him, you "substantially contributed" to this injury because you diverted one-half of the river, and I only diverted the remainder. The mere statement of the proposition carries with it its own refutation. But it has been contended that, admitting that such a proposition could be applied to the enjoyment of easements and privileges belonging to private property, in this case the plaintiff was himself guilty of committing a public nuisance by extending his wharf into the public waters of the harbor, and that for that reason he was as much a wrongdoer as the defendant, and cannot avail himself of the law to which I have just referred in relation to private rights and private property. I heard this case argued elaborately on two occasions, and I neither heard an argument or heard an authority cited, nor could I find one myself, in which a private individual could justify an injury to property in the possession and enjoyment of another upon the mere ground that such property was a public nuisance, in which he could not rely upon a like justification in relation to the private property of such individual and his rights and privileges annexed to it. In *Dimes v. Petley*, 15 P. Q. 276, it was expressly ruled that "a private individual cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him a special injury."

In the view I take of this case, the plaintiff had a right to curtail his water privileges to any extent he pleased; and for the injury he thereby caused he had no claim against the defendants or any other persons: and neither did his doing that injury to his own premises, in any respect whatever, justify the

defendants or any other strangers in doing greater injury of a similar character to his premises. It was for a claim for damages for their doing so this action was brought against the defendants; that question was not submitted to the jury, and we are therefore, in my opinion, bound to grant a new trial to have it determined.

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MR. JUSTICE ROBINSON :

This case was tried before me in the Central Circuit Court last October. It was a special action: on the case to recover damages for an injury alleged to have been occasioned by the defendant having negligently and wrongfully suffered his barge to sink in the upper part of St. John's harbor, in consequence whereof the sand brought down by the current was diverted and turned upon the plaintiff's wharf, and the water thereat was shoaled. The defendants contended amongst other things that the shoaling of the water was occasioned by plaintiff's own act, in having wrongfully extended his wharf into the harbor, whereby he had placed an obstruction to the due course of the current, and he adduced some evidence to support that view. I directed the jury, amongst other points, that if the damage complained of by the plaintiff was the consequence of his own act, or if he substantially contributed to the occurrence of the damage, the defendant would not be liable. The jury found a verdict for the defendants, and a rule returnable into this Court was obtained to set aside that verdict on the ground first, of its being contrary to the weight of evidence, and second, of misdirection in the judge leaving any question as to the plaintiff contributing to the injury to the jury.

I have reported to my brother judges, that the trial below was not satisfactory to me; there was a short attendance of jurors, and four talesmen were sworn upon the jury. One at least of those took an unusually active part in cross-examining, and in suggesting facts, and I could not but feel that he had brought with him into the box a bias with which the plaintiff might reasonably be dissatisfied; moreover, the verdict was in my judgment against the weight of evidence, and on the first ground we all concur that there ought to be a new trial.

On the ground of misdirection also, my brother judges are of opinion that there should be a new trial; but in that opinion I am not able, after careful consideration and for the following reasons to concur:—I thought at the trial, and I think still,

that if I had not left that issue to the jury, the defendants would have good grounds to complain that they had not been fairly tried, but had been denied their full defence, and the authority of adjudicated cases in England seems to justify that opinion. In 2 *M. & N.* 4, 31, it is accepted as an axiom that in actions on the case, "if the plaintiff contribute to the damage sustained by his own voluntary act, he cannot recover, etc." In *Mariott v. Stanley*, 1, *M. & G.*, 572-3, the defendant had placed an obstruction in the highway, in consequence of which the plaintiff's horse was injured, the horse had previously been restive, and one question left to the jury was whether the plaintiff by his own act "in any degree had contributed to the occurrence" and the Court on argument affirmed that ruling.

In *Sills v. Brown*, 9 *C. & P.* 606, also an action on the case, Judge Coleridge's words to the jury were:—"If the plaintiff's men substantially contributed to the injury, by improper or negligent conduct, the defendants would be entitled to their verdict."

In *Pluckwell vs. Wilson*, 5 *C. & P.*, Mr. Baron Alderson ruled, "that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."

So again, in *Lach v. Seward*, 4 *C. & P.* 106, the plaintiff left his barge at anchor in the Thames, projected beyond the proper line, (just as the plaintiff's wharf is here alleged to have been projected), and defendant injured it. Lord Tenterden thought that the plaintiff's own act was not to be ignored, but was an element for the consideration of the jury; his words were:—"If the plaintiff put his barge where men of ordinary care would run against it, the defendant would not be liable."

The learned Attorney General argued, on behalf of the plaintiff, that his client's act in extending his wharf must be held to be justifiable, and therefore that his lawful act cannot be considered as contributing to an injury committed upon him by another. Now, without denying or admitting the right in law of the plaintiff, so to extend his wharf, I do not assent to the inference which, if correct, would apply to an extension half across the harbor; for in *Abridge v. Great Western Railway Co.*, 3 *M. & G.* 516, the plaintiff had stacked his beans upon his own land, but near a railway, and sparks from the engine injured them. Chief Justice Tindall did not assume that the plaintiff could use his own land and his own beans as he pleased, and hold all accountable who might indirectly injure them irrespec-

tive of his own conduct. His Lordship's words were:—"how can we say that the farmer or the company was the more negligent, which is a question for the jury and not of law."

I have said that in my opinion, the evidence in this case was not satisfactory to establish the fact that the plaintiff *had* substantially contributed to the injury, but that the effect of that evidence was, upon principle, in the first instance, for the jury, seems to be very plain, having regard to the current of authorities upon the subject; and I cannot use more appropriate language than that employed by Chief Baron Pollock, in *Ellis v. London and S. W. Railway*, 2 H. & C. 429, which was, as this is, an action on the case, "this was an application for a new trial on the ground of misdirection. The learned judge ruled in cases like present, it is an element of the enquiry whether the plaintiff has contributed to the injury sustained by him by his own negligence; for if so, he is not entitled to redress; that was a correct statement of the law, and therefore the rule must be discharged."

And I say the same as regards the second ground of this rule. In acts of trespass the rule of law is different, for no one is justified in directly and unnecessarily injuring the person or property of another, although that other be a wrongdoer; but in "actions on the case," for indirect and consequential damages, I think the rule is as I have cited, and the authority of the case cited by the learned Attorney General, in which the defendant ran upon and injured the plaintiff's oyster-beds does not seem to me to conflict with the general principles applicable to an action such as the present.

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MR. JUSTICE LITTLE:

IN this case I am of opinion, on the point of misdirection, that there ought to be a new trial, as well as upon the report of the learned judge who tried the cause. The issue to be decided was whether the defendants obstructed the access to the plaintiff's water-side premises by so placing their sunken vessel, that the sand and gravel coming down the river were thrown towards the plaintiff's wharf, and the water was so shoaled thereby that his vessel could not get to his wharf as it could otherwise have done. The simple question for the jury was whether the act of the defendant caused the injury complained of by the plaintiff. If so, the plaintiff was in point of law entitled to recover. Now,

it was contended by the defendants that the plaintiff, by extending his wharf, contributed to his own injury, and therefore, he was not entitled to recover. Such was practically the effect of the charge to the jury. I think it was wrong in point of law. As I concur with the learned Chief Justice on this point, and for the reasons which he will explain, I shall simply confine myself to a reference to one or two authorities in support of this view. In *Addison on Wrongs*, page 18, it is laid down that "where negligence on the part of the plaintiff is remotely connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and direct negligence of the plaintiff cannot be set up as an answer to the action. *Greenland v. Chaplix*, 5 *Exch.* 248, again: "contributory negligence on the part of the plaintiff, therefore, will not disentitle the plaintiff to recover damages, unless it were such that, but for that negligence, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." The real question under these authorities was whether the plaintiff was injured by the negligent act of defendant in placing his boat where he did. The case was not presented to them in that aspect. Their finding was general upon the whole case, and it is difficult for us to determine how far, in point of fact, they were influenced by the particular view of the law laid down by the learned judge who charged them. I think, therefore, on this point, there ought to be a new trial granted as a matter of right. I may observe, that in the consideration of the amount of damage, the question of contribution by the plaintiff to his own injury might form a proper element or not. I do not think, under the circumstances of this case, the prior conduct of the plaintiff, in extending his wharf some years ago, could be deemed a justification for the subsequent obstruction placed by the defendants in the water of the harbour, to prevent plaintiff's vessel getting to his wharf.

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1864, July. HON. SIR F. BRADY, C. J.

*Practice—Recognizances—Default of defendants—Estreat—Notice 11 & 12 Victoria, Cap. 42—Jurisdiction of Court in estreat.*

The Courts of this colony are invested with all the powers and jurisdiction possessed by the Courts in England for estreating recognizances.

Where it was objected that the notice required by 11 & 12 Victoria, cap. 42, to accompany the recognizance was omitted and not given by the justice to the accused or bail, the Court held such objection fatal to the application for a rule to estreat the recognizance.

A recognizance to be valid under the statute must state the offence with which the accused is charged, or at least show the recognizance was for his appearance to answer some charge of a criminal nature made against him.

IN these cases three rules were obtained to estreat the recognizances entered into before the magistrates for the appearance of the accused parties, the latter having made default when called upon to appear, plead, and stand their trials, respectively. Against these rules Mr. Carter shewed cause in the case of the *Queen v. Cruickshank*, and Mr. Pinsent in the two cases of the *Queen v. Thompson*. Both these gentlemen relied on one general objection to the jurisdiction of the Courts in this country to estreat such recognizances; and each of them urged, also, objections peculiar to their respective cases. In respect to the general objection taken, we deem it only necessary to say, that after a consideration of all that we have heard upon it, we do not entertain a doubt that the Courts in this country are invested with all the power and jurisdiction in applications of this nature which the Courts in England possess, and that we are under the same obligations to execute that jurisdiction as they are; and that the only foundation for the objection was the circumstance that there was no case on record in which our Courts were called upon to exercise this jurisdiction. As to the particular objections, Mr. Carter, on behalf of the bail in Cruickshank's case, *Thomas McConnan*, *Robert Peace*, took one, viz.:—That no notice accompanied the recognizance, or was given by the justice to the accused or bail, and he referred us to the provisions of the 11, 12, Vic., c. 42, upon which he rested that objection. The 23rd section enacts,—

“That when any person shall appear or be brought before a justice of the peace, charged with any felony, or with any assault with intent to commit any felony, or with obtaining, or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen, or ob-

tained by false pretences, or with perjury, &c., &c., such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties, as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offences; and thereupon such justice shall take the *recognizance* (s. 1, 2,) of the said accused person, or his surety, or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the Court without leave."

The letter and figures s. 1, 2, refer to the schedule to the statute, s. 1, being the simple form of the recognizance, and s. 2, being a notice in these words:—

S. 2.

*Notice of the said Recognizance to be given to the Accused and his Bail.*

"Take notice that you A. B., of \_\_\_\_\_, are bound in the sum of \_\_\_\_\_ and your (sureties L. M. and N. O.) in the sum of \_\_\_\_\_ each; that you A. B. appear, &c., (as in the conditions of the recognizance) and not depart the said Court without leave; and unless you the said A. B. personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them."

And this notice is to be signed by the justice of the peace who took the recognizance. In this case that notice was wholly omitted, and, in our judgment, the objection upon that ground to the rule to estreat the recognizance is fatal, and must prevail. We feel that we are bound to read section 22, as if s. 1, 2, were incorporated in it, and that by the express language of the enactment, s. 1, 2, constitute the recognizance; that s. 2, which has been wholly omitted, constitutes as vital a part of it as s. 1, 3; that without there is no recognizance to estreat, and therefore upon these grounds the rule for that purpose in this case must be discharged.

In one of the cases the Queen against Thompson, the rules were issued against two of his bail men—Roger Down and William Daymond, and Mr. Pinsent on their behalf took exception to the validity of the recognizance on the ground that it did not contain any criminal charge against the accused. The statement in the recognizance is as follows:

"That whereas the said Robert Joseph Thompson stands charged before the above-named justice for that he, the said Robert Joseph Thompson, on the fourth day of January, 1864, being then employed in the capacity of clerk to William Hounsell, trading under the firm of William Hounsell and Company, did receive and take into his possession for and on account of the said William Hounsell & Company, his masters, the sum of eight

pounds eight shillings in money, and on diverse other days and times did by two several orders in writing drawn by him, the said Robert Joseph Thompson, per William Hounsell & Company, receive certain goods to the amount of seven pounds to and for his own use, contrary to the statute in that case made and provided. If, therefore, the said Robert Joseph Thompson will appear in the Central Circuit Court, to be holden at Saint John's in and for the Central District of Newfoundland, on the twentieth day of April now next ensuing, and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect of the charge aforesaid, and not depart the said Court without leave, then the said recognizances to be void," &c.

Upon a full consideration of that statement we are of opinion that it is quite insufficient, and that the recognizance is thereby rendered void. To be a valid recognizance under the statute, it ought, in the words of the statute, to state the offence with which the accused was charged, or, at least shew that the recognizance was for his appearance to answer some charge or accusation of a criminal nature made against him; but, in this case, the whole of this statement may be true, and the accused innocent of any act of a criminal character. Upon this ground we discharge the rule in this case.

In the third case the rule is against James and Wm. Wheeler; and, in that case, we are bound to overrule the technical objections taken to the proceedings and to declare such proceedings regular and valid, and we therefore order that the rule to estreat the recognizance in this case be made absolute. This disposes of the three rules in these cases, but it is impossible for the Court to see the utter failure of justice which has occurred in these cases, or rather the complete triumph, as we may now assume, which criminality and guilt have had over the administration of justice, without a feeling of deep regret, and a thorough consciousness that that result has been caused, in two instances, by the want of ordinary care and attention on the part of those who admitted the parties accused in these cases to bail in the exercise of a discretion vested in them in a matter of such a grave and important character. In conclusion, we think we are justified under all the circumstances that have come under our notice in these cases, in making a suggestion to the Attorney General to consider how far it would be advisable to proceed farther in the case in which we have made the rule to estreat the recognizance absolute, or whether the jurisdiction having been now, for the first time, conclusively established in applications of this nature by that order of the Court, considering what

has been the result in the other two cases, and also the following statement in the affidavit of the parties against whom that order was made, viz :—"That these deponents were fully impressed with the belief that their responsibility as bail for the said Robert Joseph Thompson upon certain charges of embezzlement would and did cease upon his appearing in Court upon the first day of term, and that thereafter the responsibility of his safe custody would rest with the Crown: that they had no knowledge or suspicion that the said Robert Joseph Thompson intended to abscond, or that he would fail to take his trial," he may now forbear further proceedings against these parties for their obligations to the Crown. Whatever be the course which the learned Attorney General may, in his judgment, adopt in this particular case, we hope the public will understand that this Court cannot and will not, in future, recognize any matter like that set forth in this affidavit as any excuse for the obligation which bailsmen undertake in criminal cases, and we confidently trust that this decision will not only act as a warning hereafter to all of the liabilities they incur in becoming bail in such cases, and also to all magistrates entrusted with a discretion, in the due and proper exercise of which the right administration of justice is so seriously involved, to be vigilant in the discharge of their duties in all relating to this subject, and not render their proceedings nugatory, and the ends of justice thereby frustrated by errors and omissions which ordinary care and diligence would have prevented.

*Attorney General for Crown.*

*Mr. F. B. T. Carter for Cruickshank.*

*Mr. Pinsent for Thompson.*

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1864, *July*. BRADY, C. J.; LITTLE, J.; ROBINSON, J.

*Practice—New trial—Shipping—Demise of ship—What amounts to—Priority of charter party to bill of lading—Contract of affreightment—Liability of owner of ship for damage to cargo.*

A shipper entered into a charter party with the owner of a vessel to carry butter from Boston, in the United States of America, to St. John's, Newfoundland. On the voyage a wilful and unnecessary deviation was made, by reason of which the butter deteriorated, and in an action against the owners of the ship the shipper claimed as damages the difference between what the butter realized and what it would have fetched if it had arrived according to the ordinary course of the voyage. The jury found for the plaintiff shipper. The defence set up was that on the voyage in question the vessel had been chartered to one Melledge, of Boston, and consequently the charterer and not the owner was liable. On a rule for a new trial,—

*Held*—Discharging the rule (Robinson, J., differing), The owners of a ship for whose benefit she is navigated are bound to the owners of goods shipped for the due carriage thereof, and are liable for any negligence whereby the goods may be damaged. If without fraud the master makes a charter party the ship-owner is not thereby divested of liability, but is still liable for the performance of such duties as are not inconsistent with the stipulations of the charter party.

I CONCUR in the opinion expressed in this case by my brother judge, Little, that as much of the rule as seeks for a nonsuit ought to be discharged, and upon the ground he has stated; but I also am of opinion that that course should be adopted upon other grounds relied on by the Attorney General. In my judgment this action would lie against the defendant even if the charter party bore date prior to the bill of lading, and the shipper had notice of its existence. After an anxious and laborious examination of the numerous authorities upon this subject, many of them conflicting with one another, the conclusion upon which I have arrived is that the charter party in this case does not amount to a demise of the ship, but that it is a contract of affreightment, and the distinction between these contracts is thus briefly stated in *Addison on Contracts*, 777: "Charter parties and contracts of affreightment made between the owners or the master of a vessel on the one hand, and the charterer on the other, do not amount in general to a demise or bailment of the ship to the charterer so as to clothe him with the possession of the vessel, but to a contract for the use of the ship, together with the services of the master and crew, for the conveyance of merchandize. The contract, therefore, is ordinarily a contract for the letting and hiring of the work of

carrying merchandize. If the end sought to be attained by a charter party can be accomplished without a transfer of the possession of the vessel to the charterer, the Courts will not give effect to the contract as a demise of the ship, although there may be express words of grant and demise."

So in *Abbot on Shipping* it is laid down that, "The owner of a ship, so long as he continues in possession of the ship, is in possession also of the goods carried by her, and his right to a lien on them for the freight due in respect of them, whether by *charter party* or under a bill of lading, has never been questioned. He may if he think proper part with that possession: he may demise her for a term, surrender all control over the ship itself, the appointment of her master and mariners, and even relieve himself from responsibility for wages and repairs. If he do so the person to whom he lets the ship, who is called the charterer, becomes owner *pro tempore*. The rights of the absolute owner are suspended, and among them his right of lien for the freight of goods carried by the ship."

In my opinion, the owner of the ship in this case, that is the defendant, did not part with the possession of her; he did not make a demise of her, but only gave Melledge the use of her for the carriage of the merchandize he would put upon her, merely covenanting with Melledge to convey the cargo duly and properly by his (the defendant's) ship, his master and his crew, and by virtue of that possession a right of lien on the cargo for the freight due to him under the charter party remained in the defendant. These possessions govern the present case in my opinion, because the defendant thus retaining the possession of the ship, he would be liable for the wrongful act even of the master and crew, but having personally and directly interfered with the navigation of the vessel in her course from Boston to St. John's, and thereby wrongfully caused the deviation and delay, which is the foundation of the plaintiff's cause of action, he would be in my judgment, as an active wrongdoer, clearly liable for such wrongful and tortious act (*1 Chit. on Pl. 91*). It was, however, contended that even admitting all this doctrine to be correct, the averment in the declaration "for reasonable hire and reward, to be paid by the plaintiff to the defendant," was not sustained by evidence at the trial, to which the Attorney General gave an answer that these words were mere surplusage, and that it was not necessary therefore to approve them, and such would appear to me to be a sufficient answer, particularly in reference to the third

and fourth counts, in which a duty to be performed by the defendant is laid, and the breach of that duty is laid and proved quite sufficiently to support the action; but when it is considered that in cases of charters of affreightment the owner, notwithstanding the charter party, has not only a lien on the cargo for his freight, but also a right to sue the consignee for it, I think the averment is both true in point of fact and proper in point of law.

In *Abbot, p. 301 u.*, this subject is thus referred to, "This highly vexed question and so important in its consequences to the claim of lien and the responsibilities of ownership depends on the inquiry, whether the lender or hirer under a charter party be the owner of the ship for the voyage. It is a dry matter of fact question, who by the charter party has the possession, command and navigation of the ship. If the general owner retains the same and contracts to carry a cargo on freight for the voyage, the charter party is a mere affreightment sounding in covenant and the freighter is not clothed with the legal responsibility of ownership. The general owner in such a case is entitled to the freight, and may sue the consignee on the bills of lading in the name of the master; and he may enforce his claim by detaining the goods until payment, the law giving him a lien for freight. But where the freighter hires the possession, command and navigation of the ship for the voyage, he becomes the owner and is responsible for the conduct of the master and mariners; and the general owner has no lien for the freight, because he is not the carrier for the voyage. This is the principle declared and acted upon in the greatly litigated and ably discussed case of *Christie v. Lewis*. And it is the principle declared by the Supreme Court of the United States in *Macardier v. The Chesapeake Insurance Company*, and *Gracie v. Palmer*, and followed generally by the courts of justice in this country."

I will merely add a brief abstract of the case of *Leslie v. Wilson*, as given in *Addison on Contracts, (1847) 792*, as conclusive upon this part of the case. "Thus, where the plaintiff declared that he had shipped a cargo of oranges on board a vessel, of which the defendants were the owners, to be carried from St. Michael's to London for certain reasonable reward to be paid by the plaintiff to the defendants, and that it thereupon became the duty of the defendants as such owners to appoint a skilful master or captain for the purpose of conveying the oranges with safety, but that the defendants neglected to ap-

point such captain, and on the contrary thereof employed an unskilful and improper master or captain, through whose misconduct, carelessness and negligence the oranges were lost and destroyed, it was held that the ship-owners were responsible for the loss occasioned, although the goods had been shipped on board by virtue of a charter party of affreightment under seal executed by the master, by which the latter had covenanted to convey the cargo to its destination. "We are of opinion," observed Dallas, C.J., "that this action is properly brought. The owners of a ship for whose benefit she was navigated are bound by the maritime law to the owners of the goods shipped and received on board to be carried for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants, whereby the goods may be damaged. If without fraud and in the due course of the ship's employment, the master makes a charter party (under the seal) the ship-owners are not thereby divested of liability but are still liable for the performance of such duties belonging to them in that character as are not inconsistent with the stipulations contained in the charter party; and whether that instrument be made under the seal of the master or not, seems to make no difference in this respect; because the ship-owners are not charged directly upon the contract or charter party, but upon their general liability as principals in the adventure deriving profit from the ship's employment."

This case, while as it appears to me, it cannot be in principle distinguished from the present, not only disposes of the objection as to the variance between the averment in the declaration and the evidence given at the trial; but it is also an authority upon the general view I have taken and briefly expressed as to the nature and operation of the charter party in this case.

Upon these grounds I am of opinion that the rule, so far as it prays for a nonsuit, ought to be discharged; and so far as it prays for a new trial on the ground of the admission of illegal evidence, as to the losses incurred in the sale of the butter, the recent case of *Collard v. S. E. R. Company* so strongly justifies the reception of that evidence, that I am also of opinion that this objection should be overruled, and therefore that the rule should be discharged generally.

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MR. JUSTICE ROBINSON :

If the defendant, on record as the registered owner of the *Maria Theresa*, is the proper party to be sued in this action, I am of opinion that the verdict ought not to be disturbed, upon the ground of improper reception of evidence, I think the measure of damages adopted by the jury was correct in principle and reasonable in amount.

If the butter, the subject of this action, was shipped on board the vessel after Melledge had become her charterer, pursuant to the charter party produced at the trial, and under bills of lading signed on his behalf for freight, for it to be paid to him, then I am of opinion, in accordance with a series of decisions in the English Courts, and in accordance with the view of at least of one of my brother judges, that Melledge was the owner, *pro hac vice*, and receiving the profits for carrying the goods, is responsible for the losses arising from their miscarriage. It follows that the defendant, having demised his entire ship for such voyage, was, as upon goods taken on freight by the charterer, no more the owner than a mere stranger, and could not be properly held responsible in this action.

Numerous authorities are to be found in the books to support this opinion, many of which were cited at the bar, and they are well summed up in a work of the highest authority, in the following words:—"Where a merchant engages to pay a stipulated price to the ship-owner for the use of his ship, master and crew for the voyage, and takes it and them into his service, receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and of the vessel being given up to him, it is a demise of the vessel with her crew for the voyage, the charterer, becoming owner *pro hac vice*, entitled to the rights and subject to the responsibilities which attach to that charterer."—*Abbott by Shee* 46-7.

And again, "It often happens that the charterer of a ship causes it to be laden, either wholly or in part, with goods belonging to other persons, in such cases it seems that the charterer is to be considered the owner of the ship with respect to those persons, but as different decisions have taken, it is proper to notice them."—*p. 42.*

The declaration in this case is framed *ex contractu*; each count is based upon a contract, alleged to have been made between the plaintiff and defendant, in *consideration of freight and re-*

*ward paid by plaintiff to defendant*, and as the evidence not only fails to support but directly contradicts that essential statement, the plaintiff, who can only recover *secundum allegata et probata* would not be entitled to the verdict if Webb had demised the vessel, nor could any amendment of the declaration in such an event make him liable because he would have no control over the vessel as owner; but a question of fact, and one too which lies at the root of the whole matter, appears to be unsettled and in contest.

On the trial, the plaintiff completed his *prima facie* case against the defendant as registered owner of the vessel by proving the bill of lading, dated 20th Feb., 1863, and signed by the master. The defendant answered that case by proving a charter party under seal, dated two days before, viz., 18th Feb., 1863, and signed by the same master, as agent of the owner, in which he chartered and hired the entire ship and her crew to Mr. Melledge for a voyage from Boston to St. John's, for the round sum of \$600, and he also proved that Melledge was the person who had shipped the plaintiff's butter, and who had received freight for it, and that he had consigned the ship to Clift, Wood and Co., and had paid Webb the balance of his charter without dispute.

This charter party was proved by the master, and was admitted by the Attorney General, and was read on behalf of the defendant.

No question or even a suggestion, was made throughout the trial that its time of execution varied from the date on the face of it, and I was under the impression that the legal effect alone of the instrument was the sole subject of contest, and that no difference existed on the fact of its execution, and, to save time and trouble, we threw out the intimation at the trial, that we should not then hamper the case by any discussion on the charter party, which would more conveniently be considered by the Court afterwards. Upon the argument of the rule *nisi*, a paragraph in the written evidence of the master was relied on by the Attorney General to shew, that although the instrument was dated 18th February, 1863, it was not in fact executed until the 5th or 6th March, as near as he could recollect, and consequently until after the plaintiff's butter had been shipped, and bills of lading signed; that was the first occasion on which we heard the question raised, and it took me by surprise. If the plaintiff intended to rely upon a point of such importance, it is hard to understand how it should have been passed over in

silence by both parties, especially by the plaintiff, unless the intimation made by the Court to the plaintiff's counsel, when addressing the jury, in reply, that the defendant would for the purposes of that trial, (but subject to the legal effect of the charter party to be considered), be deemed the contracting party, rendered it unnecessary for him to notice the charter party at all. Whatever was the cause, the effect is, that when the Court comes to determine the question of law, it is met by a controversy upon a question of fact so material that it is the very corner-stone of the whole case. What is to be done? The parties do not admit it, the jury have not found it, the Court cannot legally determine it, and a new trial seems to me obviously necessary. Otherwise, we can give no decision, or we must decide without facts, or if we should assume a power which we do not possess, and find this controverted fact one way or the other, we should then be disposing of the rights of parties without hearing them, and upon a point too which the interposition of the Court may have prevented, and probably did prevent the plaintiff's counsel discussing.

If the three judges were unanimous upon the effect of the evidence respecting the charter party, it would still be improper to prejudice the rights of either party by arrogating to ourselves the functions of a jury; but we are not unanimous, and therefore there is the greater necessity of submitting the fact to a jury, unless the plaintiff and defendant shall now set the question at rest by admission one way or the other, in which event, I suppose, the judgment of the Court could be delivered at once and this litigation terminated.

In the absence of such admission, I entertain no doubt that the ends of justice require that the verdict shall be set aside and a new trial ordered for the purpose of ascertaining this material question of disputed fact.

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**MR. JUSTICE LITTLE:**

THIS action was taken to recover damages sustained by the plaintiff upon a quantity of butter shipped by his agents in Boston on board the defendant's vessel, the *Maria Theresa*, on the 20th Feb., 1863, and to be landed in the usual form, and of that date was signed by the master, M. J. McLoughlin, of the proper delivery of the butter to Harvey, Tucker & Co., the consignee. Instead of proceeding direct from Boston to St. John's, it appeared in evidence that there was a wilful and unnecessary

deviation by the vessel's putting into different ports out of the usual course of the voyage. In consequence of the delay thus occasioned, the plaintiff alleged that the voyage was improperly protracted, and he claimed the difference in this action between the price the butter realized after its arrival and what it would have fetched if it had arrived at the proper time, according to the ordinary course of the voyage, allowing the time vessels usually take at that period of the year in performing it. The jury found a verdict for the plaintiff for £25 15s. 1d., and thereby affirmed the question of deviation and the amount of damages. The defence set up by the defendant was that on the voyage in question the vessel was chartered by the master to James P. Melledge of Boston, for \$600, and consequently that the charterer and not the defendant was liable for any loss the defendant may have sustained; that there was no unnecessary deviation, and that under any circumstances the plaintiff was not entitled to recover substantial damages by reason of the non-delivery of the butter in due time. A charter party to Melledge was put in evidence, and proven by the master to have been executed on the 5th or 6th of March, 1863, as nearly as he could say, although it appears to bear date on the 18th February, in the same year. Upon the argument of the points of law reserved upon the trial, it was contended by the Attorney General for the plaintiff, that the charter party only took effect from the time it was executed, and not from the time it bears date; and consequently that the bill of lading having been signed and delivered at a time, namely, the 20th February, prior to the execution of the charter party, the defendant, as owner of the vessel, was thereby bound to the plaintiff for the fulfillment of the bill of lading, while he also contended that the charter party even if executed on the 18th February, would not relieve the defendant from his liability to the plaintiff.

From the view I take on the point of the prior execution of the bill of lading, I do not deem it necessary to enter into the consideration of the general effect of the charter party. I hold the defendant bound by the bill of lading signed by the master, for according to the evidence, I entertain no doubt that it was delivered before the charter party was executed. With the charter party in his hand the master, apparently a shrewd, intelligent witness, swore, first to the day he left Boston, the 10th March; the day of his arrival in St. John's, on the 25th April, and that the charter party was executed on the 5th or 6th of March, as nearly as he could say. I cannot suppose therefore

for a moment that he was in error in that statement. Such a view was not attempted to be put forward by the defendant's counsel. Now according to the authority of *Ashery vs. Hicks, Cro. Jac. 263*, cited in *Abbot on Shipping, 508*, a charter party, like every other deed, takes its effect and operation from the day on which it is sealed and delivered, and not from the day on which it bears date if different from the day of delivery, unless there be words of reference to the day of the date, and therefore whereby a charter party dated the 9th day of October, but not delivered till the 28th of October, one party covenanted to pay a moiety of the value of all the corn "which then was and thereafter should be laden on board the ship," it was held that he was not liable to pay for any corn that was not really on board the ship, on or after the 28th October, in fact the corn was cast away between the 9th and the 30th October. I consider this case conclusive, and assuming the facts as proven to be correct, I think it could not have admitted of any doubt whatever.

Then, the only remaining question is whether the plaintiff was entitled to recover damages for the loss he sustained. I am of opinion that he was. He shipped his butter for this market, at a period when the article, being Canadian butter, was much in demand here for domestic use, and according to the evidence, if it had arrived in due course it would have fetched a higher price than it did. Considerable arrivals of other butter taking place about the time of the arrival of the *Maria Theresa*, a fall took place in the price of butter, and it appears to me that the loss thereby occasioned to the plaintiff is clearly attributable to the defendant's ship-master, the practical result of the deviation, and such as may fairly be presumed to have been contemplated by the contracting parties to the bill of lading upon the shipment of the butter. We all know there are certain periods of the year when particular articles command a higher price according to circumstances than at other times. If shippers of new fish, for instance, from this market to Brazil were left to the mercy of ship owners who might find it convenient for their own purpose to deviate from the proper course of the voyage and thereby incur unnecessary delay in the delivery of the cargo at the port of destination, it would appear to me to be both reasonable and fair that they should be indemnified by the ship owner for any loss they might sustain by his misconduct in arriving so late at market, that, in the meantime, it became overstocked by other arrivals, and a fall consequently took

place in the price of fish. I see no distinction between such a case and the present; the same principles apply to both. The breach of contract being proved, the amount of damages in all such cases must depend upon circumstances to be established in evidence. If the butter had increased in price between the time it ought to have arrived and the time of its actual arrival, the defendant could have shown that, and the plaintiff would then only be entitled to nominal damages for the breach of contract committed by the defendant's ship-master. If the delivery could have been delayed without good cause for one month with impunity, why might it not be delayed for six months with impunity? The natural result of a deviation like this necessarily depends not only upon the nature of the act, but also on the object of the shipment. Now, the object of the shipment in point of fact was to secure the quickest as well as the highest market in St. John's. To defeat this purpose, by delay on the part of the master, would frustrate the ordinary and natural result of the adventure. In the said edition of *Addison on Contracts*, page 1066, the principles on which damages are calculated in such cases as the present, is thus laid down: generally speaking when articles of merchandize, such as corn, hops, hemp, &c, are delivered to a carrier to be carried to a market town, and the carrier fails to deliver them in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold, if they had been carried according to contract, and their marketable value at the earliest period at which they could have been brought to market after their delivery to the consignee, will in general be the measure of damages recoverable.—*Collard v. S. and G. Co. 30, Law J. Exch. 393*. Again, in an action against a common carrier for loss sustained by long delay in the delivery of articles of merchandise intrusted to him, to be carried, whereby the consignee lost the season for selling them to advantage, and the marketable value of the articles was seriously diminished, it was held that the carrier was answerable for this loss, it being such as might naturally be expected to result from great delay in delivering articles of merchandise.—*Wilson and Lane and York, Rail. Co., 9, C. B., 642*. Such are the doctrines governing the charge of the court to the jury, upon the trial of this case, and which warranted the admission of evidence to show that the butter had sold for a less price than it would have fetched if it had arrived at this market in proper time.

For these reasons, I am of opinion that the verdict ought not to be disturbed. I think further that the amount of damages was so fairly and fully considered by the special jury who tried the cause that defendant could scarcely expect to benefit on this point by submitting it to any other jury.

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PINSENT, COLLECTOR OF WATER ASSESSMENTS, v. BOYD & Co.,  
 RICHARD O'DWYER, PETER MCPHERSON, LAUR. GEARIN,  
 WM. PARKER, HOUNSELL & Co., JOHN HOGSETT,  
 JOHN B. BARNES & Co., E. SMITH & Co.,  
 JOHN TARAHAH, MORISON AND BUCHAM.

1864, July. BRADY, C. J.; ROBINSON, J.

*Water Company Acts 22 Vic. and 26 Vic.—Construction of—Assessment—Consumer's rates—Assent by Governor to Act in contravention of his instructions—Effect of.*

Under the Water Company Acts 22 Vic. and 26 Vic. the consumer's rate is not recoverable in respect to any detached building into which a branch pipe has not been first introduced by the Company.

It is no answer to the claim for rates as a consumer that the building occupied is a store, and neither a house or premises within the meaning of the Acts. Every building, except churches, within two hundred yards of the main pipe of the Company, and into which a service pipe has been introduced, is liable to a water rate.

An antecedent appraisalment of the annual rental of consumer's houses is indispensable to give the Sessions Court summary jurisdiction over consumer's rates at the suit of the collector of the company.

Acts of the Newfoundland Legislature, assented to by the Governor in contravention of his instructions, are operative until disallowed by the sovereign.

I ONLY intend to add a few observations supplementary to the judgment of the court, just read by my brother judge, exclusively upon the point which was, at our desire, argued on Wednesday last, with the view of stating the grounds upon which I am satisfied that there has been a fatal *omission*, in the legislation upon this subject, of provisions for the performance of certain matters which were essential to be performed before the collector would have power to sue, or the Sessions Court jurisdiction to entertain the summary suit in his name. The 21st section of the 22nd Vic., cap. 7, imposed an "assessment"

of one and three-quarters per cent. upon "the owners of all houses and other buildings along which pipes had been laid," &c. The 23rd section enacted—"For the purpose of ascertaining the amount of such *assessment* and of collecting and *recovering the same*, it shall be lawful," &c., to appoint one or more appraisers who shall annually appraise all such house and other building, and deposit the books of such appraisal with the Clerk of the Peace. The 24th section enacts "Such return shall be open to the examination of *all parties interested therein*"; and the magistrates were to hold a court for revision of the appraiser's return, "and, after the expiration of the times fixed for the holding of such court, the said return shall be final and binding on all parties. By the 25th section the collector shall, as soon as possible *after such appraisal*, collect from the parties respectively liable in that behalf their contribution towards *such assessment*; and in case any person so liable shall neglect or refuse to pay such contribution, the same may be recovered with costs in a summary manner by a suit in the Court of Sessions for the Central District, to be brought in the name of the collector. The whole of this legislation, by its express language, has reference only to the one and three-quarters "assessment," and not to any water rate that might be thereafter fixed or established; and the only parties whose interests were affected by it were the "owners" mentioned in the Act, and not the "occupiers" or "consumers" as distinguished from owners. The "owners," therefore, would be the persons for whom the 24th section provided that the return should be open to the examination of all parties *interested therein*, and they would be the parties "*named in such return*," and who could under the same section, "by a notice in writing, to be filed in the office of the said Court and served on the said appraiser, object to the amount of the *assessment* imposed upon them"; and finally, they would also be the parties to whom the last clause of that section would apply—"And after the expiration of the times fixed for the holding of such Court, the said return shall be final and binding on all parties for the then ensuing year"; that is, on all owners who were alone interested in it, and who were alone enabled to object to the amount of the assessment imposed on them; but it did not profess to affect the rights or interests of any other parties, such as mere occupiers or consumers. This enactment confers a new jurisdiction upon the Sessions Court, namely, to adjudicate upon actions for this *assessment* for any amount, and brought

in the name of the collector, a remedy which, being contrary to the course of the common law, must be strictly pursued. To sustain this jurisdiction it must appear, in order to comply with the express language of the Act, that the action is brought "after such appraisalment," and that it is brought to recover from the persons sued "their contribution towards such assessment." It is therefore, in my judgment, indisputable that the Sessions Court has not jurisdiction to entertain a suit brought in the name of the collector, unless it appear that there had been a valid appraisalment and that the action is brought for the defendant's contribution to the assessment as it appears in the appraisers' return, which is made final and binding on all parties subject to such assessment. If these are shewn, the Court of Sessions has jurisdiction to adjudicate in suits against "owners" for their respective proportions of such assessment; but so far there is no jurisdiction conferred upon that court in suits like the present which are for recovery, not of the assessment, but of water rates, and not against owners, but against occupiers or consumers. The first enactment in relation to water rates is in the 27th section of the same Act, which enacts that "As soon as the said company shall have introduced the necessary branch pipes for supplying the houses and other buildings subject to assessment, they shall, with the assent of the Governor and Council, fix a scale of rates to be paid by consumers, yearly or half-yearly, as the company shall decide; and any occupier into whose house or premises the necessary branch pipes shall have been introduced, who shall refuse to take the water, shall, nevertheless, be liable for the rate *applicable to his case*." This enactment does not specify in what mode or manner the scale of rates is to be fixed or determined; it does not declare expressly or by implication that it was to be by a percentage upon the annual rent or value of the property, as in the case of the assessment on owners, but, on the contrary, the words "*applicable to his case*" would seem to import something different, and that the scale of rates was not to be uniform as to the property of all occupiers or consumers. Neither does this enactment declare by whom or in what manner the annual value of the property of occupiers respectively is to be appraised, or by whom or in what manner such rates are to be collected or recovered. Under these circumstances no one could contend for one moment that Mr. Pinsent could maintain actions in the Sessions Court in his own name for the recovery of the water rates imposed upon consumers, or that

the Sessions Court would have any jurisdiction to entertain such actions. But, admitting that to be so, the Attorney General contended that this jurisdiction was given and created by the 1st section of the 26th Vic., cap. 4. That section enacts that 'it shall be lawful for the directors of the said company, subject in all cases to the approval and control of the Governor in Council, from time to time to fix and establish the water rates and assessments payable under the said Acts at such amounts as may be necessary for the purposes of the said Acts, all which rates and assessments shall be paid in advance half-yearly, and shall be levied and collected in manner prescribed by the said Acts as to the assessments thereby imposed.' If such were necessary, after what I have said upon the 22nd Vic., cap. 7, this enactment contains a legislative declaration that the provisions of the former Act had regard, exclusively, to the mode and manner whereby the assessment imposed by that Act was to be levied and collected. So far then as respects the assessment upon the owners the law is plain and simple—the three and one-half per cent. now imposed is to be levied and collected as the assessment of one and three-quarters per cent. was to be levied under the former Act. That is, the collector is empowered to collect, and, in case of refusal to pay, to sue in the Sessions Court in his own name for each owner's proportion of the assessment as shewn by the appraiser's return after it has duly become, in the words of the Act, final and binding on such owners. The collector is not authorised to collect or sue until the appraisement is complete; and to render such appraisement complete it is essential—first that the property to be assessed should be appraised by a person duly appointed for that purpose; secondly, that the books of such appraisement should be deposited with the Clerk of the Peace, for the examination of all parties *interested therein*, for a month; thirdly, that a court for revision of the appraisement be held, in which it is competent "for any *party named* in such return to object to the amount of the assessment imposed on him"; and fourthly, the return is then final and binding upon the parties interested in that return. A strict compliance with these provisions constitute the foundation upon which is based the collector's power to sue, and the authority of the Sessions Court to entertain or adjudicate upon the suits or actions he may bring. In the case of assessments upon owners they have been all complied with and no difficulty can arise, for the collector has thereby power to sue and the court to adjudicate in actions for contribution

to the assessment; but in respect to the water rates, every one of these are wanting, and, therefore, in my judgment, the collector has not authority to institute a similar proceeding, nor has the Sessions Court jurisdiction to entertain it, for the recovery of these rates. In the first place, I am unable to discover any valid appraisement of the property of occupiers or consumers for the purpose of determining the amount of their contribution to the rates. The Acts do not give any authority to appoint an appraiser, or to make out and deposit books of appraisement with the Clerk of the Peace for that purpose; but only for "ascertaining the amount of the assessment and collecting and recovering the *same*," and not the water rates. Secondly, there was no return by appraisers open to the examination of consumers, for the only return made was only open for the examination "of all parties interested therein," and these were, as I have already shewn, owners and not consumers. Consequently, there was no month's inspection of appraisement books for occupiers or consumers; no opportunity for them to give the notice in writing to object to the amount of rates imposed upon them, which the Act enabled "any party named in such return" to give, for the only return made being for owners it gave merely the names of owners, and did not give, or profess to give, the names of the consumers, nor was there any court empowered to revise the return of consumers. Under such circumstances, in my judgment, it would be impossible to hold that the appraisers' return in this case was in the language of the 24th section of the 22nd Vic. cap. 7, final and binding on the consumers, or that it did, in any manner whatever, affect their rights or interests. Assuming, then, that the 1st section of the 26th Vic. gives the collector the same remedies for the recovery of rates as he had by the previous Acts for the recovery of the assessment, the foundation which is essential to sustain proceedings like the present in either the case of assessment or water rates, namely, a valid appraisement and a return final and binding on the parties sued, is wholly wanting in these cases of water rates, and for that reason the collector was not empowered to institute the actions in the Sessions Court, nor had that court jurisdiction to entertain them. To bring the rates payable by consumers within this new jurisdiction plain and unambiguous language should have been used, and the requirements upon which that jurisdiction was based, should be strictly observed and pursued, as was done in respect to the assessment under these Acts, and the court is not at

liberty to establish such a jurisdiction by strained interpretations, inferences and intendments, such as the Attorney General laboriously and ingeniously endeavoured to deduce from the 1st section of the 26th Vic., cap. 7. It is in fact a case of "omission" which the legislature only can supply; but this portion of the argument has been so fully observed upon in the judgment delivered by my learned brother, I will merely say that upon the grounds enunciated in that judgment and those which I have just stated, I am of opinion that the court below had not jurisdiction to entertain or adjudicate upon these actions, and that, therefore, the proceedings in them ought to be quashed.

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MR. JUSTICE ROBINSON :

THESE are judgments of the Court of Quarter Sessions which were delivered in summary suits against the several defendants to recover water rates and assessments. They come before this Court under writs of certiorari. They have arisen under Acts of the Colonial Legislature, 22nd Vic. and 26th Vic., passed to incorporate a General Water Company in St. John's, and the defendants in the several suits have agreed, for convenience sake, that all should be argued and considered together.

The objections taken by Messrs. Hogsett and Carter to the validity of the judgment in Boyd and McDougall's case, apply to all the others; whilst Mr. Pinsent raises in McPherson's case, the additional objection that the building his client occupies, and on account of which he has been rated as a consumer, is a store held by him as tenant at a rack rent, and being neither "house or premises," is not liable for the tax under the 27th sec. of the 22nd Vic., and in Geran's case, that for want of necessary drainage to carry off the surplus, he cannot use the water of the company, and should not be charged.

The Acts in question are 22 Vic., cap. 7, passed in 1859, and the 26 Vic., cap. 5, passed in 1863, in amendment and extension of the former. These two Acts being *in cadem materiam* are to be constructed "as if they were one statute, framed upon one system and having one object in view."

The Attorney General, on behalf of the Water Company, contends that the Court below is warranted by the enactments above mentioned in all that it has done; that it has not exceeded its authority, or done, or omitted to do, anything which

would render its proceedings void; and that all preliminaries necessary to invest that Court with authority over these causes were duly observed. I concur in the proposition he submits that this Court has no power to examine, on certiorari, the merits of these cases, or to rehear them, and can only interfere in the event the Court below having no jurisdiction, or having exceeded its lawful powers, whereby the proceeding before it became *coram non iudice*.

Mr Hogsett has taken an objection which I shall first dispose of, because, if well grounded, it would go to the root of the whole matter; it is that the Acts in question are absolutely void, 1st, as being contrary to natural justice in compelling parties to pay to a private company for water which they may not want and may not use, and to pay too in advance; 2nd, as having been assented to by the Governor without a suspending clause, they being, as he contends, private Acts, and the Royal Instructions that accompany the Governor's Commission requiring the introduction of a suspending clause into every private Act.

Perhaps it would be difficult to shew at the present day what power exists under the ordinary forms of the constitution of Great Britain, except in Parliament itself, to avoid or control a statute, clear in its enactments, upon the ground of it being contrary to natural justice. But I do not deny that if a colonial legislature—which derives its authority from a written charter—should exceed the powers conferred upon it on its creation, and enact measures repugnant to the statute laws of England, or contrary to natural justice, that such enactments might not be held by a court of justice inoperative. I have not the least difficulty in declaring that the Water Company Acts do not come within that category; on the contrary, their object is highly beneficial, it is to introduce an ample supply of pure water into this large town, and by that means promote the health and comfort of its inhabitants and increase the security of their property. Such a supply of the first necessary of life would surely be an inestimable boon, and the statute which would provide it cannot properly be deemed repugnant to natural justice. If these Acts were void in principle, they would be void *ab initio*; but it is admitted in argument that the objection is not so much to the principle of the law as to the mismanagement with which it has been worked, and to the oppressive weight of taxation that is the consequence of such mismanagement; but the abuse is no sound argument against

the use of any measure; that such mismanagement has taken place, and an onerous amount of taxation has been imposed, seem to be couceded on both sides, but a court of justice has no power to afford redress where the law is clear. I may, however, be allowed to observe that it would have been very remarkable if in a novel undertaking of such an extensive character as the introduction of a full supply of water into a city, from a distance of four or five miles, mistakes in engineering and mismanagement in details had not occurred. I am also willing to acknowledge that some of the provisions of these Acts are of an arbitrary character, especially those which compel an individual to pay to a private company for a domestic accommodation which they may not want, desire or use—very distinguishable from a general assessment to pay for a public benefit from which all derive advantage; but such provisions have been imposed by the representatives of the people in general assembly, and to them must there be an appeal for any desired alteration.

As regards the want of a suspending clause, I am of opinion that it does not affect the validity of the Acts. A Governor's commission is under the great seal of Great Britain; but the instructions which accompany it are not usually under any seal, and are in fact only what their name implies, directions from the sovereign to her representative as to the mode in which he shall execute his delegated authority; they are merely directory, and whilst for the non-observance of them he is answerable to his Royal mistress (*Clarke's C. L. 27, Ch. Op. 241*), the Acts of Assembly assented to by him, even in contravention of an instruction, are operative until disallowed by the sovereign. Moreover, it is an established rule of law that a subsequent ratification is equivalent to an antecedent command; and the two Acts now under consideration have been confirmed by the Queen, who has thus ratified the prior assent of the Governor, and sanctioned his proceeding.

These Acts being valid, the next consideration is whether they have been legally carried into effect. The validity of those judgments has been impugned upon several grounds, to all of which I shall refer, as well for the satisfaction of the parties and their counsel as because of the large interests involved. But before I notice the objections taken to the jurisdiction of the Court below, and to the sufficiency of the appraisement on which the judgments were given, I shall dispose of some minor objections.

It is urged on behalf of such of those defendants as occupy several detached buildings, that under the 27th section, the introduction by the company of a branch-pipe to each detached house or building, subject to assessment, is a condition precedent to the recovery of such assessment; whilst the Attorney General—admitting that the company have not introduced into each detached building a branch-pipe—contends that they are not obliged to do so, and have complied with the law by introducing a branch-pipe into any one building upon land held by the same occupier as one messuage, and that the company have no authority to traverse a man's property for the purpose of introducing pipes, but each owner must at his own cost lead branch-pipes whither he may desire from the one introduced by the company. A careful examination of the 27th section, and of the 4th section of the 26th Vic. will demonstrate the intentions of the legislature in this respect; the 27th section enacts that as soon as the company shall have introduced the necessary branch-pipes for supplying the houses and other buildings subject to assessment, they shall fix a rate for consumers, &c; and to enable the company to carry out this duty, the 4th section of 26th Vic. enacts "that it shall be lawful for the company, without the consent of the occupiers, to introduce branch or service pipes into any building subject to the rate or assessment"

Remembering that a principal object of the law is to increase the security of property against the ravages of fire, and taking into consideration the reasonableness and justice of the position, that each detached building which is liable to pay consumer's rate for water should be placed in a position to enjoy that water, coupled with the language of the Acts, I am of opinion that no consumer's rate is legally recoverable in respect of any detached building into which a branch-pipe has not first been introduced by the company, and that this objection must prevail in those cases to which it applies. As regards the special exceptions taken by Mr. Pinsent, on behalf of Mr. McPherson and Mr. Geran, I cannot hold that they are sustainable. It seems to me on a fair reading of the Acts that the legislature intended and has with sufficient clearness declared that every building, except churches, &c., within 200 yards of the main pipe, and into which a branch or a service pipe had been introduced by the company, should be liable to a water rate, (properly imposed) and that the right of the company to recover that rate cannot be affected by the use to which the occupier pleases to apply his building or by the absence or presence of sufficient drainage.

And now I come to the objections taken to the jurisdiction of the Sessions Court in these cases, and to the sufficiency of the appraisement made under the 22nd Vic., to support these judgments, on which appraisement they are avowedly based.

It is contended by the defendants that the plaintiff is merely the collector of assessments on owner's property imposed by 22nd Vic., and has no authority to maintain a summary suit in his own name for consumer's rates, imposed by 26th Vic., and that the court below had no jurisdiction to entertain such suit; but I am of opinion that the exposition of the Attorney General on this point is the correct one, and that the combined operation of both Acts would have been sufficient to confer upon the collector authority to institute, and upon the court below jurisdiction to entertain, such a suit for consumer's rates, provided there had been a valid appraisement of consumer's property.

The next objection taken by counsel is to the sufficiency of the appraisers' return,—1st, for not carrying out in a liquidated sum the amount each was liable to pay; and 2nd, for not shewing that the proviso to the 1st section of the 26th Vic. had been duly regarded. If the judgment under review had been confined to the recovery of owners' assessments, I should perhaps have considered the return sufficient to support such judgment, upon the ground that it would enable the collector by a simple arithmetical calculation to ascertain with certainty what each should pay; and the maxim of law would then apply *id certum est quod certum reddi potest*, and as respects the proviso that as nothing appeared to the contrary, the Court would be bound to presume that it had been duly regarded by those whose duty it was to carry it into operation, but as the Court has arrived at the conclusion that the judgments are invalid as respects the consumers' rates upon another ground, I need not dwell longer upon these points.

In critically examining these Acts it appeared plainly that the jurisdiction of the Sessions Court to entertain a summary suit in the name of the collector of water assessments, could only be legally enforced upon an appraisement regularly made and completed pursuant to the 22nd section, and grave doubts arose in our minds whether there had been, or under the present Acts could be, any valid appraisement of consumers' property. This precise point had not been as fully noticed in the argument as we could have wished, and we deemed it proper to request a re-argument upon it; accordingly on Wednesday

we heard all that the sound learning and practised ability of the Attorney General could suggest in support of the appraisalment on which the judgments were founded. The two questions that arise are: 1st, was an antecedent appraisalment of the annual rental of consumers' houses indispensable to give the Sessions Court summary jurisdiction over consumers' rates at the suit of the collector? and 2nd, was such appraisalment legally made before these judgments were given? The first question may be briefly answered by stating that under the 26th Vic c. 1, consumers' rates "are to be levied and collected in manner prescribed by the said Acts as to the assessments thereby imposed," and as those assessments can only be recovered in a summary suit upon an antecedent appraisalment, consumers' rates can only be recovered upon a like appraisalment.

The reasonableness of this will appear evident from this consideration, that the Water Company would not be justified in raising, by the united aid of assessments on owners and rates on consumers, a larger sum than would suffice for the payment of the annual interest upon the capital stock and their working expenses. Now to ascertain what would be a sufficient percentage for these two purposes, it is obvious that the value of the property that is to bear this *ad valorem* tax must first be ascertained. How was that to be done? The Legislature directs that it shall be done as regards owners' property by sworn appraisers, but it has omitted to make any provision as regards consumers' property, and this will appear by reference to the 22nd Victoria.

By the 21st sec.—As soon as the Water Works shall be in operation, the owners of all houses and other buildings within 200 yards of the pipes, shall pay annually in manner herein-after provided  $1\frac{1}{2}$  per cent., except churches, &c.

22nd sec. defines who shall be deemed such owners subject to the assessment.

23rd sec. states that for the purpose of ascertaining the amount of such assessment one or more appraisers shall be appointed, who shall annually appraise all such houses and other buildings aforesaid, and deposit their book with the clerk of the peace.

24th sec. provides for an examination of this book, and enables every one named therein to object to the amount of assessment imposed on him, after which such return is final and binding on all parties.

25th sec. enables the collector after such appraisalment shall

be completed, to collect from the parties liable on that behalf their contribution towards such assessment, and the same may be recovered in a summary manner.

There is nothing further in the Act referring to appraisement, and I think it is perfectly clear that the above provisions apply solely to the appraisement of owners' property, and have no relation to consumers' property.

It is equally clear that the special power given to the Sessions Court by the 25th sec. can only operate upon an amount previously ascertained by an appraisement made, revised and completed in manner before mentioned. Then remains the question, has any such appraisement of consumers' property been taken to support these "judgments"?

The only appraisement submitted to the Court below on these suits was that made under 22nd Vic, which had reference solely to owners' property as I have already shown. It was completed before the 26th Vic. was passed, and could not have reference to what was not then in existence. And the judgments now in review are for the recovery of rates and assessments imposed by the latter Act.

Now the 26th Vic does not provide for or even name any appraisement, or in any manner refer to appraisers or their functions, and does not make any provision for ascertaining the rent value of consumers' property, or for the return of their names; and the want of such provision is fatal to the claim of the Sessions Court to entertain suits in a summary manner in the name of collectors for the recovery of owners' rates. It is a *casus omissus*, whether intentional or unintentional I cannot say, but in no case can a court of justice supply such an omission, that is the sole province of the Legislature (*Dwar. 711*).

We should not be justified by law in presuming that the legislature must have intended that consumers' rates should be recoverable in a summary manner, or that it intended to confer upon the functionaries appointed to appraise owners' property, the power to perform another duty, viz., to appraise consumers' property—to raise such a presumption would be nothing less than judicial legislation; and the language of Mr. Baron Channel in delivering judgment in the case of the Alexandra on the 11th of last month, sets that pretension at rest. His Lordship says: "in days long past judges often invaded what we now consider the sole province of the legislature. They interpreted statutes to include cases which they assumed to think, ought to have been included, thus not merely constituting themselves

legislators, but legislators *ex post facto*; that I think will never be done again."

Moreover, the omission is not merely leaving out a word, for instance the word "appraised," before "levied and collected"; a good deal more legislation would seem to be necessary; a whole section is devoted to the definition of those who shall be deemed "owners," and I think it is quite as requisite to define those who should be deemed consumers, especially when the tax proposed to be levied upon the latter is more than double that imposed upon the former.

Many cases may be conceived as likely to arise in respect of consumers, which would not arise in respect of owners, and on which legislation would seem to be indispensable for a satisfactory appraisement.

It cannot be denied that a tax of  $7\frac{1}{2}$  per cent. per annum, upon a consumer's house or building, for water which he may not wish for or want, (and which in such a case as Mr. Geran's might be a positive nuisance), is a burden and a heavy burden upon private property; it must be borne, if clearly imposed; but beyond question it is not to be created by construction or intendment; the language of Lord Chief Justice Best, in *Seales v. Pickering*, 4 Bing. 450, is very appropriate to the present case. That was an action brought against a Water Company empowered to supply the town of Stratford-le-bow with water. The company entered upon land for the purpose of carrying out the object of the Act and the words of the statute seemed very strongly in their favor, but his Lordship said, if the company enter upon any man's land (as the appraiser would have to do) they must clearly shew their authority, and if the words of the statute on which they rely are ambiguous every presumption is to be made against the company and in favor of private property.

It is argued by the Attorney General that the appraisers, when appraising owners' property under the 22nd Vic., did in effect return the rent value of those, who would be consumers under the 26th Vic.; but "if that were so their act was purely gratuitous, the law did not require them to do so, such work did not come within their sworn duties, and above all there was no necessity on them, whilst perfectly performing the task they were appointed to execute, to insert in their return the names of tenants who would be the consumers; and on an inspection of the return we find the fact to be that they have not done so. Now surely it is repugnant to every principle of equity that a man should be bound by a return made behind his back—of

which he may have no notice or knowledge to which he was not a party—wherein his name does not appear, and the correctness of which he has no legal means to impugn or revise. In *R. v. Andover*, (Con. 550), the Court of Queen's Bench quashed a proceeding because the party rated had no opportunity to appeal. The Attorney General also contends that the language used in the 26th Vic. may be taken to be a legislative recognition of the sufficiency for all purposes of the appraisalment antecedently made; for although it is not mentioned it must, he argues, be presumed that the legislature had it in view; but the words do not support such a construction, and it would be carrying the doctrine of intendment and presumption beyond all bounds if thereby we should establish against consumers an appraisalment which had been made for another purpose, and without reference to them, and in which their names do not or need not appear.

Nothing has appeared before us to raise even a doubt upon our minds of the fairness and *bona fides* of all these proceedings, but it is upon their strict legality we have to determine; and after the best consideration I am capable of bestowing, I have arrived at the clear conclusion that these judgments of the Sessions Court have been based upon an appraisalment which, as regards consumers who are not owners, is a nullity, and that such judgments being bad in part are bad in the whole and must be quashed.

In thus determining the legal interpretation of the Acts, I am comforted by the reflection that if I am mistaken the legislature is at hand to explain its own meaning, and to express more clearly its legislative will.

It will be observed that I have confined my observations to the cases before the Court, which are all summary judgments in the name of the collector. I offer no opinion upon the rights of the company to sustain an action of debt before a superior court, under the incorporating clause of the 22nd Vic.

*Carter, Hogsett and Pinsent* for defendants.

*Attorney General* for the Water Company.

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1864, *July* HON. MR. JUSTICE ROBINSON.

*Insolvency Act—Obtaining credit without means of paying—Appropriation of voyage for benefit of self—Failure to account to partner—Concealing property from creditors.*

Where the insolvent expended the balance of the monies obtained by him for the sale of bait upon the purchase of provisions for himself and family, without any regard to his pledge to pay for a seine obtained from his supplier,—

*Held*—Such an expenditure was a dishonest act, a fraudulent misappropriation of his assets, rendering the insolvent liable to imprisonment under the Insolvency Act.

THE petitioner, Michael Wall, has applied to be declared insolvent and discharged from prison.

The committing creditors, Messrs. Hounsell & Co., resist the application upon the grounds that he is not in fact insolvent, several of his debts being old and barred by the Statute of Limitations, and that even if he be insolvent he is not entitled to be discharged from prison, because he has been guilty of fraud.

I think the petitioner, as insolvent, was under the obligation of an oath to insert in his schedule all his debts, old and new, and, although the Statute of Limitations might if pleaded bar the recovery of those over six years, they are not the less debts, and the schedule would have been imperfect if they had been omitted. I must, therefore, and do hereby declare him insolvent. The only question that remains is whether he has been guilty of such fraudulent conduct towards his creditors as would render him liable to imprisonment and so prevent his present discharge. The acts of fraud alleged against him are as follows, and it is due to the petitioner that I should dispose of them seriatim :

1st.—That he ordered a caplin seine from Messrs. Hounsell, and took it on credit without having the means of paying for it.

2nd.—That he broke faith with Messrs. Hounsell, lulling them into security by promising payment from time to time, until he had recovered the bait money and placed it beyond their reach, when he repudiated that debt for the time appropriating a large portion of the funds for the benefit of himself and his family.

3rd.—That he is guilty of breach of trust towards his partner Richard Power, by not duly accounting with him.

4th.—That he concealed his property from his creditors.

I am of opinion that there is not the slightest ground for imputing fraud to the petitioner on the first allegation. Messrs. Hounsell knew quite well what were Wall's means when they accepted his order, and they took care to act on their knowledge, for they refused to deliver the seine to him until he had given to them satisfactory security for the payment of its price. Mercantile men give credit for their own advantage, and charge proportionate profits. It would be a happy circumstance for all classes if less credit was given, and parties who supply on credit need not expect courts of justice to protect them against the probable consequences of their own mode of conducting business. As regards the 3rd and 4th allegations, it is sufficient for me to say that I do not think that they are established by evidence. As respects the 2nd allegation I feel reluctantly coerced by the force of the evidence to adjudge the petitioner guilty of fraudulent conduct, and to commit him to prison pursuant to the directions of the Act.

Mr. Bond states in his oath,—“three or four times I demanded payment for the seine from Wall, after the bait money fell due in August; he said he would see me paid as soon as the bait money was got in, and wages were paid. He promised me one day that I should be paid every farthing by the following Saturday. At another time he told me that he had done very well, that I had been a good friend to him, and that he would be well able to pay for the seine. About five or six weeks ago he came into our office, I asked him why he had not paid us as he promised, when he said he did not acknowledge the seine and that I might look to Power for payment of it. He has not paid for the seine.”

It appears from Wall's statement and his own book, that he collected for bait taken during the past summer by this seine £160 1s. Out of that sum he paid £128 14s. 3d. for servants' wages, his own and his servants' diet, outfits for the boat, and £12 10s. which he states he handed to his partner Richard Power. He expended the balance £31 6s. 9d., as he alleges, upon the purchase of provisions for his family, without regarding his pledge to pay for the seine, or appropriating one farthing towards it.

The petitioner says that the above sum of £31 6s. 9d. was little enough for his family during the summer, which family consisted of his wife and two young children, but in my opinion he was not at all justified in his conduct. It is very commendable that a man should take care of his own, but he should not

do so at the expense of others; he must be just before he is generous, and I consider such an expenditure, under the circumstances, a dishonest act and a fraudulent misappropriation of his assets.

It would be highly pernicious to the interests of any commercial community, if a man could with impunity so trifle with truth, and disregard the just claims of his creditors; still more pernicious would it be, if it were supposed that the Court would, by the summary process of a declaration of insolvency absolve a party from the payment of his debts who had acted as the petitioner has, without imposing upon him any penalty, and therefore whilst I declare the petitioner Michael Wall insolvent, I sentence him to be imprisoned in the gaol of St. John's for fraudulent conduct towards his creditors, for the period of five weeks to be computed from the day of his arrest at the suit of Messrs. Hounsell & Co.

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IN RE ESTATE THOMAS PARKER.

1864, *July*. BY THE COURT.

*Executor—Incapacity of—Petition by next of kin for removal of Executor and appointment of Receiver.*

Where an executor was from bodily health incapacitated from attending to the duties of the estate, the Court on the petition of the widow of the testator, with the consent of the testator's children, referred the matter to the master to appoint a fit and proper person as receiver of the estate.

IN this estate the widow of the testator has presented a petition to this Court setting forth her interests as one of the legatees in the will of the said deceased, and that Mr. Charles Simms, the surviving executor, being incapacitated from bodily health to attend to the duties devolving on him as executor of the testator and being about to leave this colony, and praying that she may be appointed guardian of the said estate of her children and their interests under their father's will. The assent of the children is annexed to the petition, and the estate appears to be worth about between two and three thousand pounds. The petitioner further asks that the accounts of the estate may be referred to the master for investigation. We have given the matter our best attention, and have come to the conclusion

that as the grounds of the application are not substantially contradicted, under all the circumstances that it is for the interest of Mr. Simms, as well as for all concerned, considering his position in relation to his impaired state of health and his intention to leave the colony, that some fit and competent person should be appointed receiver of the estate to act instead of executor, who is unfortunately—and we can only say with the greatest sympathy, we deeply regret the circumstance—unable to discharge the duties of the office of executor with the required efficiency and satisfaction. We feel also that it is for the convenience of Mr. Simms, that before he leaves the colony he should have an opportunity of having the accounts of the estate examined and passed. We shall therefore refer it to the master to appoint a fit and proper person as receiver of the estate, and examine the accounts thereof, with such further directions as will give the control of the estate to the receiver in the formal order we shall draw up; and in making up this order, we have followed the course adopted in other estates over which Mr. Simms had control, as the officer of the court, and from which he was relieved at his own request upon the grounds of his inability to discharge the duties of his office, as guardian or administrator of several estates.

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BRENTON *v.* BIRKETT.

1864, *July*. HON. SIR F. BRADY, C. J.

*Wreck and Salvage Act, 23 Vic., cap. 5—Jurisdiction of Commissioner.*

A Wreck Commissioner under 23 Vic., cap. 5, has no jurisdiction over property found and taken at sea outside the three mile limit.

THIS was an action of trover tried before me at Burin on the last Southern Circuit. The property, the value of which the plaintiff sought to recover, consisted of articles picked up at sea and brought into Burin by the plaintiff, and there seized and taken from him by the defendant, as a commissioner of wrecked property under the 23 Vic., cap. 5. At the trial the plaintiff proved that he picked up this property five or six miles from the coast of Newfoundland in open seas, and submitted that the defendant had not jurisdiction over such property unless it were taken within three miles of the coast; while the

defendant insisted that his jurisdiction extended to all wrecked property that came within his district, no matter where or at what distance from the coast, it was taken up or found. I told the jury that if they believed the evidence of the plaintiff that this property was picked up at sea at a distance of four or five miles from the coast, or at any distance exceeding three miles, they ought to find a verdict for the plaintiff, as in that case the defendant, as such commissioner, would not be justified in depriving the plaintiff of it; but that if they were not satisfied of that fact they ought to find for the defendant. The jury found a verdict for the plaintiff, and I subsequently granted a rule returnable into the Supreme Court to Mr. Emerson, as counsel for the defendant, to have that verdict turned into a verdict for the defendant, if upon the argument of that rule, we should be of opinion that my direction to the jury was erroneous, and that the defendant was clothed with the extent of jurisdiction he contended for. Mr. Hogsett for the plaintiff shewed cause against that rule at the last sitting of the court, and Mr. Pin-sent replied in support of it, and after a full consideration of the case and of the arguments addressed to us, we entertain no doubt that the defendant was in error in supposing that he had jurisdiction over wrecked property which had been found and taken up at sea, at a distance exceeding three miles from our coast. From a careful perusal of the Act, it will be found that the earlier sections refer to wreck cast upon the land, and that the 16th section was enacted to provide a remedy for recovery of wreck, whether flotsam, jetsam, ligan, or *derelict*, found in the open seas. That section defines the extent of the commissioners' power in respect to the latter species of wreck. It enacts "when such property shall be found *in the water within three miles of the coast of this colony*, or on any part of the shores thereof, and be detained by any person not being the owner thereof or his agent, and such person shall refuse, on demand being made, to deliver up such property to such commissioner, in such case it shall be lawful for such commissioner to apply to any justice of the peace," &c., &c., in order to obtain the possession of such property. This is the only authority expressly given by the Act over wreck found in the open seas, and that, in itself, would be sufficient to decide the case in favour of the plaintiff, on the principle that a jurisdiction being expressly given to the extent of three miles such jurisdiction to any greater distance was thereby necessary implication.—*Expressio unius est exclusio alterius*. Again, if it were intended to give the commissioners

jurisdiction over wreck taken in the open seas at any distance from the coast no rational ground can be assigned for introducing the limitation of three miles, while the introduction of that limitation is to be accounted for and justified on the proudest principles, viz., that it is consistent with the well established rule under which, I believe, at the present time, all civilized countries bounded by the sea exercise dominion to the extent of three miles from their coasts, as part of their territories.—“The common rule appears that which was recognized by Lord Stowell (*The Anna*, 5 Rob.) *terræ dominium finitur armorum vis*; or that the sea within cannon shot, or about *three miles* from the coast, is regarded as a necessary adjunct to the dominion of the land on the coast.” *Palmer on Wreck*, 7, and *Lela*, 1 *Swawbey*, 40. Upon these grounds we are of opinion that the defendant had not jurisdiction over property taken or found three miles from the coast of this colony, and that therefore the verdict in this case ought not to be disturbed, but that the rule for that purpose, should be discharged.

*Mr. Hogsett* for plaintiff.

*Messrs. P. Emerson* and *R. J. Pinsent* for defendants.

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BROWN ET AL., EXECUTORS OF STEPHEN ROBERTS,  
v. ROBERTS ET AL.

1864, *August*. HON. MR. JUSTICE ROBINSON.

*Will—Construction of—Contingent estate—Absolute estate.*

Where the testator's will contained the following clause: “In case either of my children should die unmarried or married without lawful issue, the property and money I leave to such child is to descend to his surviving brother, or his issue, and in the event of both my sons dying without issue, the property shall go to my wife during her life time, and at her decease descend to my nephew, Henry Percy Roberts, or his heirs”; one of the sons having died before he attained the age of twenty-one, the nephew claimed an interest in the estate contingent on his surviving cousin dying without issue.

*Held*—That the words of the will confer on the surviving son a present absolute estate, divested of any condition, limitation or remainder.

THE suit has been instituted by the executors of Stephen Roberts to obtain a judicial declaration of the estate which

Stephen Alexander Roberts, the surviving son of the testator, takes under the will of his father.

The important words of the will as regards the question in contest, are "in case either of my children should die unmarried or married, and without lawful issue, the property and money I leave to such child is to descend to his *surviving brother or his issue*, and in the event of both my sons dying without issue, the property shall go to my wife during her life time, and, at her decease, descend to my nephew Henry Percy Roberts or his heirs."

Under these words Henry Percy Roberts claims an interest in the estate, contingent upon his cousin, Stephen Alexander, dying without issue; whilst the latter contends that—as lands in this colony are chattels real, and as he has attained the age of twenty-one years, and has survived his brother, who died before he attained that age, and without lawful issue, he takes a present absolute estate divested of all conditions or limitations.

We have carefully considered the authorities cited and the arguments urged by the several counsel who have addressed the court. It is a well established rule of construction that a devise "to a man or his issue," in the case of reality, passes an *estate tail*, and that such words as would create an *estate tail* will pass an absolute estate to the first taker in a bequest of personalty (*1 Mad. 467, 4 Mad. 361*), unless the words of the will clearly manifest a different intention. We find nothing in the language of this will to take it out of the general rule, and we are all of opinion that Stephen Alexander takes a present absolute estate in the property bequeathed by his father, divested of any condition, limitation or remainder, and only subject to the widow's rights under the will.

As regards costs, the complainants being executors and having no interest in the estate except to discharge their fiduciary obligations according to law, are entitled to their costs and expenses out of the estate.

The defendants, Stephen Alexander and Jane, who have succeeded in establishing their right to all they respectively claimed, are entitled to taxed costs out of the estate, and, as respects Henry Percy Roberts, although he has failed in establishing any interest under the will, yet the language of that document was calculated to raise a reasonable doubt, and the authorities upon the subject are conflicting, moreover, he has been brought before the Court as a defendant, and in the con-

duct of the suit he has not occasioned any unnecessary expense, we think, therefore, it is equitable and consistent with precedent that he also be allowed out of the estate his taxed costs.

And it is decreed accordingly.

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SHAW v. BARTLETT.

1864, September. HON. MR. JUSTICE ROBINSON.

*Ship—Bottomry Bond—Personal liability of owner—Wages of seamen.*

The *Emma* of which defendant was the owner effected a bottomry Bond at Cadiz for repairs on her voyage to England from Newfoundland. On arrival of ship the defendant did not take up the bond. The plaintiff proceeded against vessel and sold the same to satisfy the bond. The master and crew having intervened for wages, the latter were paid out of the proceeds of the sale. The balance was insufficient to pay the amount due under the bond. In an action against the defendant for the difference, as money paid to the defendant's use.

*Held*—The hypothecation of the ship does not render the owner personally liable.

PLAINTIFF'S claim, £93 11s. cy. wages, namely, £21 16s. cy., being earned since advancement of monies on the bottomry hereafter mentioned, and £71 15s. cy. earned prior to such advancement, and £50 19s. 2d. cy., admiralty costs.

The facts necessary to be known for the determination of the issue are as follows:—

In August, 1863, the *Emma*, of which the defendants were the owners, arrived in St. John's from Cadiz, under bottomry, effected at Cadiz for repairs on her voyage from England to Newfoundland. The defendants did not take up the bottomry bond, and the plaintiff proceeded against the vessel in the Vice-Admiralty Court, by decree of which she was sold to satisfy the claims upon her. The defendants did not appear or intervene in the admiralty suit. When the proceeds were paid into court, a claim was made upon them by the master and seamen, who had previously intervened for their wages. This claim was admitted, as far as the seamen were concerned, by the bottomry holder, but successfully resisted as regards the master upon the ground of his having become personally liable under the bond; and in consequence the above amounts were paid out of the said proceeds to the seamen and their proctor, the costs being such

only as were necessarily incident to the recovery of the wages. The proceeds being insufficient to pay the bottomry bond and the wages, the payment of the above amounts to the seamen lessened by so much what the holder of the bottomry bond would otherwise have received, and he brings this action to recover the difference, as money paid by him to the defendant's use.

It is submitted by the plaintiff that he is entitled to recover from the defendants the said wages and costs; while the defendants say they are not liable to repay any part of the said monies; and it is submitted to this Court to determine whether the defendants are liable for the same or any part thereof; and, should it be decided in favour of the plaintiff, then that he enter up judgment against the defendants for such sum as the Court may determine, together with his costs of suit; and should the judgment of the Court be for the defendants, then that judgment be entered for them as against the plaintiff, together with the costs of this suit.

The bottomry bond, ship's articles, and the proceedings in the Admiralty Court form part of this case.

We have carefully considered the arguments and authorities adduced in this case by the Attorney General, for the plaintiff, and by Mr Pinsent, for the defendant; and, whilst acceding to the validity of all the decisions of English courts cited by the former, we are unanimously of opinion that they do not apply to the present case, and that judgment should be entered for the defendant, upon the ground that no contract express or implied has been shewn to exist under which the plaintiff can legally claim from the defendant repayment of the amount paid to the seamen of the *Emma* by a decree of the Vice-Admiralty Court out of the proceeds of the vessel realized to liquidate the plaintiff's bottomry bond.

A bottomry bond is a security altogether *sui generis*. The essence of it is, that the lender runs the risk of the voyage, (2 *Park* 884). Under one granted by the master, the obligee can look only to the ship, and to the person of the borrower, not to the owner of the vessel. (*Johnson v. Shipper*, 1 *Salk* 85 — *Pritchard* 72). And in consideration of the risk he runs, he charges, in the name of maritime interest, an amount of remuneration much larger than is known to other contracts.

When the lender advances his money under this peculiar security, he accepts such security with its burthens, and must be presumed to have agreed to take payment out of the fund he

trusted, after preferable claims, if any, upon it shall have been deducted, of which seamen's wages are the principal. "Wages take precedence of bottomry bonds by the universal rule of the Court; whoever advances money on bottomry must be presumed to do it with a full knowledge of the law on this point." *1 Dod 40; 2 Dods 7-13.*

If the present action were sustainable, the lender would be enabled indirectly to hold the owner personally liable beyond the amount of the property or fund specially trusted, which would contravene the rule of law I have above referred to, viz.: "The hypothecation of the ship by the master does not render the owners personally liable."

Such an event as that which arose in the case of the *Emma* must be of frequent occurrence in England, and yet the research of the Attorney General has failed to find a single English authority to sustain the present action.

The case of the *Virgins* cited in *Pritchard* is an American decision; and, although the judgments of American Courts are entitled to every respect, the case of the *Virgins* is not sufficiently before us, *in extenso*, to justify us in acting upon it. We have seen but an abstract, and that abstract is not necessarily inconsistent with our present judgment, for it does not appear whether the obliger in that case was not also owner, in which event he would be personally responsible under the covenant in his own bond; here the obligor was master only and not owner.

Let judgment be entered for the defendant pursuant to the special case.

*H. W. Hoyles* for plaintiff.

*R. J. Pinsent* for defendant.

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1864, September. LITTLE, J. ; ROBINSON, J.

*Larceny—Indictment—Killing with intent to steal—Proof of carrying away—  
Question for jury.*

Where the prisoner was indicted for killing with intent to steal one ewe, and the evidence showed the ewe had been driven into his stable by an innocent third party, the Court were of opinion that it was for the jury to say whether there had been a taking and carrying away within the meaning of the Act.

INDICTMENT for killing with intent to steal one ewe of the goods and chattels of Patrick Bowden, of Belle Isle, Conception Bay.

The Attorney General conducted the prosecution on behalf of the Crown, Mr. Prowse appeared as counsel for the prisoner.

The Attorney General addressed the jury and called the witnesses for the prosecution, Mary Bowden, Jas. Bowden, Thos. Searle, John McKay and Joseph Moore.

Mr. Prowse moved that a verdict of acquittal be entered for the prisoner, on the ground that there was no proof of a stealing, taking and carrying away within the meaning of the statute under which the indictment was laid. That admitting for the sake of argument there was evidence of a killing, the *animus furandi* on the part of the prisoner was completely rebutted by the fact that the sheep had been driven into his stable by an innocent third party, and therefore the stealing, taking and carrying away, if done at all, was the act of third parties, anterior to his killing, and by persons who were not known to be in any way connected with the prisoner or acting in collusion with him. The learned counsel cited *R. V. Williams, 1 Mood, c. c. 107*, and *R. V. —nd, 6, C. & P., 17, 6*, in support of his position.

The Court were of opinion that was a question for the jury.

Mr. Prowse then addressed the jury for the defence, and called the Rev. Joseph Phelps and Rev. G. M. Johnson to prove the good character of prisoner.

His Lordship Judge Robinson, in a very able and lucid charge, summed up, and, after being absent for about two hours, the jury found the prisoner not guilty.

*The Attorney General for Crown.*

*Mr. Prowse for accused.*

1864, *December*. HON. MR. JUSTICE ROBINSON.

*Shipping—Shipment of goods—Stoppage in transitu—Bills of Exchange for cargo accepted—Insolvency of vendee, what is.*

When goods are consigned on credit by one Merchant to another, and whilst on their way and before they are delivered the consignee becomes insolvent, the consignor by law is permitted to resume possession of the goods or what is called *stoppage in transitu*.

The fact of bills of exchange having been drawn and accepted for the price of the cargo is no bar to the right of stoppage.

Even where goods are sold on credit and part payment made the consignor will be entitled to stop them if the consignee be shewn to be insolvent even before the credit has expired.

A declaration of insolvency is not necessary to enable the consignor to avail of the right of stoppage. It is sufficient to show that at the time the goods were stopped the consignees were under a general inability to pay their debts.

THIS cause was tried by a special jury. Mr. Whiteway opened the case for the plaintiffs, and proposed to prove by the letters and bills of lading the plaintiffs' *prima facie* case. Mr. Hogsett was also for the plaintiffs, and closed the case to the jury.

The nominal defendant (represented by Mr. Pinsent) had upon indemnity delivered the cargo in question to Messrs. Brooks & Co., for whom the Attorney General, Mr. Carter and Mr. Keough appeared. We had intended publishing the evidence of Mr. E. A. Brooks, the agent of Brooks & Co., who came from New York relative to the cargo per *Jonas*, and who related his conversation with W. M. Barnes, of the firm of Barnes and Co., and described their inability to give him security, and their expression of intention to apply part of the proceeds of the *Jonas* to the payment of Customs' bonds, &c. But the length of the judge's charge compels us to exclude the details of his testimony.

Mr. Justice Robinson summed up, and in substance said:—

The plaintiffs in this action are Messrs J. B. Barnes & Co., Merchants of St. John's, and the defendant is Francisco Lopez, master of a Spanish barque called the *Jonas*; and the action is brought to recover a valuable cargo of West India produce, amounting it is said to about £2500.

The amount at issue renders the case one of considerable importance, both to the plaintiffs on the one hand and to the substantial defendants on the other.

The fact that so large a sum is contingent upon your just verdict would entitle the case to serious and careful consideration at your hands; but it has other aspects of a peculiar inte-

rest. There appears to be a large number of local claimants, creditors of the plaintiffs, exercising no inconsiderable influence in getting up and bearing the cost of these proceedings; and such a circumstance does to a certain extent justify the observation of the learned Attorney General as to the degree of influence that would be thus set at work to affect the issue of this case in a court of justice. The real defendants too are utter strangers to you, and naturally look with some anxiety to the decision of a local tribunal where local interests are so deeply concerned adversely to their own.

No greater blow to commerce could be inflicted, no more serious injury could befall the mercantile relations of any community, than that reason were given to apprehend that justice was not to be found in its Courts when the interests of foreigners were involved. The consequences would be almost as serious as the pestilential influence of yellow fever, and all would keep clear of a country and the merchants of a country where, when the rights of strangers came in conflict with local interests, there was no justice to be found for the foreigner. His Lordship concurred with the Attorney General in the hope—nay, more, in the belief—that no such verdict would be given as would lead to so calamitous and disgraceful an impression. The counsel for the defendant has said that he expected that Messrs. Brooks and Co. would receive the same justice at their hands as they would in Cuba, whence they came. He (the learned judge) would put it in a different shape:—The ordeal he would suggest would be what a British jury in a British court of justice, under British law, disposing of civil rights under the solemn obligations of their oaths, would do.

There was no part of the British Constitution more deservedly admired than the fearless independence and unswerving impartiality of its administration of the law in every British Court.

We had lately heard juries exhorted to bring in verdicts that would be received with acclamation; but he would say that no verdict ought to be received with approval unless one by which justice was enabled to triumph over knavery, and such a verdict as, guided by law and supported by facts, would bring peace and satisfaction to the consciences of those who gave it.

The action was one of trover for the conversion of the property referred to, and the plaintiff is required to establish his right of property and his right of possession. The declaration alleges that the defendant wrongfully converted their property, and the defendant says that the property is not the property

of the plaintiffs, and issue is joined upon that question, and you are sworn to try that issue. Mr. Whiteway in opening the case stated the fact of the ordering of these goods and of their shipment, and the transmission of the bill of lading to the plaintiffs; and if goods thus shipped and consigned to them had been received into the possession of J. B. Barnes and Co., then Brooks & Co. could not deny the property to be that of Barnes, although not paid for; but possession or the right of possession is necessary to the sustainment of the action, and before the cargo reached the consignees, Messrs. Brooks, the vendors, appear on the scene and stop the goods, in order to prevent their getting into the possession of the consignee, and thus the validity of the *stoppage in transitu* comes to be the point in the case. The learned counsel Mr. Hogsett had remarked strongly upon the inquisitorial nature of the investigations in this case into the condition and circumstances of the plaintiffs; but he (the learned judge) could tell them that in every like case the same proceedings would be allowed, because in similar situations they were not only consistent with, but prescribed by, the law of the land, and they could not prevent the defendants from taking a course which was conducive to justice and highly favored by the law of England. The defendants in effect say—"You have on its way to you property of mine sent to you on the faith of your good circumstances. We find that your circumstances are not good and that you are not able to pay for it, and we wish to get our property back before it gets into your possession."

This is the defendant's position, and if they are found to have observed and carried out all the incidents of the law necessary to justify their proceedings, they will be entitled to your verdict, and the *onus* of proof rests with them. The law is thus laid down in a work of authority:

"When goods are consigned on credit by one merchant to another, it sometimes happens that the consignee becomes bankrupt or insolvent while the goods are on the way to him and before they are delivered. In such case it would be hard that the goods of the consignor should be applied in payment of the debts of the consignees, and the former is allowed by law to resume possession of them, if he can succeed in doing so while they are on their way; this resumption is called *stoppage in transitu*, and was first allowed by equity as it is now also by common law, where, on account of its remedial nature, it is regarded with considerable favour"

This is the law of England, of common sense and of common honesty. But to enable the consignor to exercise this remedial measure, it is necessary that the goods should be stopped while in possession of the carrier. It is not made a point in this case that they were not. A notice to the master of the vessel at the time and place proven here was sufficient to make valid this stoppage (the other requirements of the law being complete). The fact of bills of exchange having been drawn and accepted for the price of the cargo, is no bar to the right of stoppage. It has been put to you very earnestly that the goods having been sold on credit deprives the vendor of this right. Such is not the law, and the bills need not be returned before the stoppage is carried out if the circumstances of the vendee have become so deranged that he will be unable to pay the bills at maturity. If it were not so the vendor would have to trust to a broken reed. And further, that this right may not be embarrassed by any doubts, I will add that if goods be sold on credit and part payment made, yet the consignor will be entitled to stop them if the consignee be shewn to be insolvent even before the credit has expired. With this exposition of the law, for which we are responsible, you will now come to the important consideration—the insolvency of the vendee. Mr. Hogsett is correct when he tells you that the stoppage will be only effectual in case of the bankruptcy or insolvency of the vendee; but he is wrong when he goes further and says that a declaration of insolvency is necessary. Such is not the law, and the law is consistent with the common sense of the case; for it would be very inconsistent to suppose that a declaration of insolvency, which it might take months to carry out, and which the vendors would have had as yet no power to bring about, should be necessary to enable them to avail of the right of stoppage which the law so highly favors; and if you are satisfied that when the goods were stopped by Brooks, Barnes & Co. were under a general inability to pay their debts, evidenced by a stoppage of payment, that is such evidence of insolvency as satisfies the requirements of the law. The refusal and omission to pay debts have been held for the last century, under numerous authorities, down to the very last year to be sufficient proof to justify the course pursued by the defendants. It was the duty of the jury to receive the law as laid down by this Court; but their lordships thought it desirable in a case of such deep interest and importance to read from a few authorities of the highest order. [Here the learned judge

read the *dicta* of Lord Denman and Baron Parke in *Biddlecombe vs. Bond*, in *Gossage vs. Parker*, and the judgment of Dr. Lushington, delivered in February, 1863, in the case of the *Tigress*. He thought that after these authorities the judgment of the learned counsel for the plaintiffs could hardly fail to be convinced.

Were then the jury satisfied of the general inability on Barnes's part to pay their debts? That was to be gathered from Barnes's conduct and conversations with Mr Ernest Augustus Brooks, and from the vast amount of evidence on the part of the defendant of debts due and refusals to pay by Barnes.

Here His Lordship remarked upon the conspicuous perspicuity and careful precision of young Mr Ernest Brooks in giving his evidence, which Mr. W. M. Barnes, who was in court and heard it, was in a position to contradict, if any part of it had been untrue. He was surprised then at the observation that the plaintiffs had no opportunity of meeting that part of the case. So far from Mr. Barnes being precluded, it would have been one of the most natural things in the world, if he could do so, for him to have said—"These alleged debts are not due," or, "I have property sufficient to pay all I owe"; and it is for you, gentlemen of the jury, to draw your own conclusions from this pregnant fact, and to apply it as you would out of doors in regarding a transaction of your own.

Is it likely, too, that a solvent man would have declined Mr. Brook's offer to take back a cargo upon which (if it were so) a very serious loss was to be sustained from the state of the market? Then they would remember the observation made by Barnes to Mr. Brooks, that to assign the bills of lading to him would be fraudulent by our law; and there was much weight due to the observation of the Attorney General upon that point when he said that that remark of Barnes could have reference only to an existing state of insolvency, as it was only in such a case that an assignment of property could be fraudulent.

These facts, combined with the proved mass of indebtedness, attachment of property and execution in the plaintiff's house, mortgages upon their real estate, and assignments of their vessels, were all matters for the jury to draw its own conclusions from as honest and intelligent men. Here His Lordship read Mr. E. A. Brook's evidence, commenting upon it throughout, and then generally referred to the other testimony. Other

parties (creditors) had, it appeared, undertaken to bear the costs of this suit. The question likely to arise from that fact was: Why should it be necessary to stimulate the Barnes' to the recovery of so large an amount of property if they were solvent and would enjoy it themselves? The jury would draw a fair and reasonable deduction from this circumstance. The only substantial question for them was: Were they satisfied of the inability of Barnes to pay his debts? If that were proved to their satisfaction they should find for the defendant; if such were not the case it would be their duty to find for the plaintiff.

The jury after a few moments returned with a verdict for the defendant.

*Mr. Whiteway* for plaintiff.

*Mr. Pinsent* for defendant (nominal).

*The Attorney General, Mr. Carter and Mr. Kough* for Messrs. Brooks & Co.

### QUEEN v. THOMAS N. MOLLOY.\*

1864, *December*. LITTLE, J.; ROBINSON, J.

*Bond—Custom House Bond—Execution of—Practice in— Usage of trade in—  
Authority to sign—Subsequent ratification.*

In an action upon a Custom House bond to recover from the maker the sum named in the bond (being the amount of duties payable by the party for whose accommodation the bond was made, and for whom the maker became surety) the name and seal of the maker appeared on the bond, binding him to the Queen for the amount sought to be recovered. The defence set up was *non est factum*, and a special plea to the effect that the maker did not seal and deliver the bond, that after signing it the amount of the bond and several additions were inserted in the same, and these alterations were made without his assent or authority.

*Held*—A bond executed in blank and left to be filled in by another who has no authority under seal is void at law;

*Held*—That authority under seal would not be necessary to fill in the blanks in a bond if from all the circumstances a general authority to do so could be gathered, and in a case where the maker of the bond had himself sealed the bond;

*Held*—If a party sign a bond to which no seal is affixed, and the blanks in the bond be afterwards filled in without any authority from the maker, the latter is not liable.

\* Vide *Queen v. Molloy*, Post, July, 1865.—[EDITOR].

THE Attorney General, having opened the case to the jury, called Henry Barnes, who deposed that he lived with his father, one of the firm of J. B. Barnes & Co.; the bond produced has my signature at foot as subscribing witness; that bond was not signed, sealed and delivered in my presence; I put my name to it because I was told to; I saw neither of the parties sign the bond; the signature "W. M. Barnes," at the foot, is my uncle's—one of the firm; I do not know Thomas N. Molloy or Alexander Mitchell's writing; I put my name after it was signed—do not know how long after.

W. M. Barnes called: who says, I am one of the firm of J. B. Barnes & Co.—the other partners are Ebenezer and John B. Barnes; my name is at the foot of the bond in question. Whose are the other names objected to? The form in the Customs' Management Act requires a subscribing witness. Objection overruled but reserved.

Witness proceeds: I think the bond was signed by the defendant and Alexander Mitchell in my presence; the bond or form was not so filled up as it is now; it was in blank at the time; the written part was not filled in; Molloy signed it when the written part was not filled in; seals were on it as now; I asked Molloy to sign a bond; I think I said I was going to take some rum out of bond; I don't recollect that he said anything; I asked him to sign it; he did not ask what I was going to put in the bond; I did not tell him what quantity I was going to take out; he did not ask that I recollect; I did not tell him what amount I was going to fill in; I think it was after night in defendant's office; I don't recollect if any one was present; I had no further assent or authority for filling up than his simply signing his name

The practice now at the Custom House is and has been for the last month to require a declaration from the subscribing witness that he was present at the execution, and that the bonds were filled in when executed.

Question: What is the practice or custom among merchants as to the signing and filling up of these bonds?

Objected to by defendant's counsel.

Attorney General: It is to show the authority the trade gives to one another to fill up these instruments, and that Molloy was cognizant of it, and it is to fix him with the knowledge of the usage. After argument the question is allowed but reserved.

Witness continues: It is the practice of some houses to have the bonds filled in after; I do not say that it is the general practice; I have signed them so myself, and have known others do so for me; Molloy signed one or two so for me; at the time Molloy signed it I made no representations further than I have told you; Mitchell signed it after Molloy; it was still in blank; it was afterwards filled up by me for the quantity I desired to take up; I got the rum out of bond upon it; no part of the money has ever been paid; it would have been paid if the Customs' authorities had not wrested a cargo out of my possession by advice of the Attorney General.

Cross-examined by Mr. Hogsett: Sometimes bonds may be filled up, sometimes not; I speak of my own practice and of parties who sometimes brought bonds to me.

By Judge Robinson: I am not certain whether Molloy handed the bond to me or whether I took it from the desk; don't know who calculated the duties; I can't say if I have signed bonds for Molloy; if I went to a brother merchant and asked "Will you sign a Custom House bond for me"? it would be sufficiently explanatory of what I meant.

Mr. John Canning, Assistant Collector of Customs: I know the parties; I have seen the bond before, when entries were passed at the Custom House; not quite sure if William or Ebenezer Barnes brought it; the entries were passed for taking the rum out of bond; it was brought to me as it is now; I am not aware of any peculiarity.

By Judge Little: I should not have taken that bond if I had known it had not been filled up before it was executed; I am not aware of any practice of the trade to fill up bonds in blank; not aware of any practice of the kind and I have been thirty years connected with the Customs; the practice is to bring them to the Custom House complete; it is the first occasion I have heard of a Customs' bond being questioned.

Mr. Pinsent moves for a non-suit.

No proof of execution—none of sealing and delivery, none of subsequent assent, nor of prior authority.

Point reserved.

Mr. Pinsent then addressed the jury for the defence, and after referring to the Customs' Management Act, which he contended pointed clearly to the official authorities themselves taking the bonds, commented strongly upon the irregularity and laxity of their practice, looking at the unfortunate results it had produced, and argued that they had made Barnes their

agent to obtain a security which the authorities took when they might have required payment of the duties. The learned counsel reviewed the whole evidence, and especially pointed to Mr. Canning's on the question of any practice of trade to shew the fallacy of that position, and also to the fact of a new rule being established at the Customs to shew that the Crown felt the illegality of former proceedings. He then referred to the proof of execution, requisite in the case of a deed or bond, all which had been negatived by the evidence for the Crown, and referred to the testimony he now proposed to adduce. The learned counsel proceeded, and at the close of his address called Thos. N. Molloy, examined by Mr. Hogsett:

I am the defendant; the paper was entirely in blank and no seal to it when I signed it; nothing but Barnes's name at the foot; there was no one present; I gave Barnes no authority to fill up the amount contained in it, nor any specific sum; when Barnes came in to me he laid the form on the desk; I asked him what it was for; he answered it was for four or five puncheons of rum; the duty on that would be £50 or £70; I should not sign a bond for anyone for such a sum as £750.

Cross-examined: He told me four or five puncheons of rum; this was before I signed it; it was between eleven and twelve o'clock in the morning.

I have occasionally signed Customs bonds, transportation and warehouse bonds; very little for duties; this was the last I signed; I think I have signed one or two warehousing bonds for Barnes before, one was filled up and the other not. I think Barnes signed a bond of some kind for me once; my young man may have got a bond signed for me. Warehousing bonds are generally filled up; I have generally signed them when filled. My impression was that the present bond would be filled with four or five puncheons; I understood that before a party would make use of it there would be a seal put.

Alexander Mitchell called.—I signed this bond in the month of May; I cannot exactly say, but I do not think there were any seals to it then; it was blank when I signed; Molloy's name was to it. I did not sign in the presence of any subscribing witness.

Question by Mr. Hogsett.—What representations did Barnes make at the time you signed?

Objected to by Attorney General; objection allowed by the Court.

The Attorney General then went to the jury, contending that it was an immoral defence and that defendant had made Barnes his agent, and that there was proof of his assent and authority.

Mr. Justice Little summed up. His Lordship addressed the jury in terms following: The questions you have to determine under this action are of a very important character, and should be disposed of by a strict regard to the evidence and the law applicable to the case, irrespective of sympathy for the defendant a surety, or partiality for the Crown as the plaintiff, and just in the same impartial spirit as any other suitors coming before this Court would have a right to be treated.

I shall read the pleadings in the cause so as to direct your attention to the issue you have to try.

#### IN THE SUPREME COURT.

ST. JOHN'S, }  
S. S. }

On the twelfth day of Nov., A. D. 1864, Our Sovereign Lady Queen Victoria, by Hugh W. Hoyles, Her Majesty's Attorney General, complains of Thomas N. Molloy for that the defendant, to wit, on the sixteenth day of May, Anno Domini eighteen hundred and sixty-four, by his writing obligatory and sealed by him and bearing date the day last mentioned, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of two thousand two hundred and twenty-seven pounds ten shillings of good and lawful money of Great Britain, equal to ten thousand six hundred and ninety-two dollars, to be paid to the plaintiff, her heirs and successors. Yet the defendant, although often requested, has not paid the said sum or any part thereof, but refuses so to do, and the plaintiff claims from the defendant by reason of the premises the sum of three thousand five hundred and sixty-four dollars, equal to seven hundred and seventy-two pounds and four shillings sterling.

H. W. HOYLES, H. M. Attorney General.

NEWFOUNDLAND, }  
Saint John's, to wit. }

The defendant, by Robert J. Pinsent, his attorney, defends this action and saith for his first plea that,—

1. The alleged writing obligatory is not his deed :
2. And for his second plea the defendant sets out the said alleged writing obligatory in terms following :

D.

*(Bond to be given by the Importer for Duties on Goods Imported.)*

Know all men by these presents, Wm. M. Barnes, Thos. N. Molloy, and Alex. Mitchell, all of St. John's, merchants, are held and firmly bound unto our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in

the sum of two thousand two hundred and twenty-seven pounds ten shillings of good and lawful money of Great Britain, to be paid to our said Lady the Queen, her heirs and successors. To which payment to be well and truly to be made we bind ourselves, and each of us by himself, for and in the whole, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals. Dated this 16th day of May, in the 27th year of the reign of her said Majesty, and in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above bounden Wm. M. Barnes has lately imported into port of St. John's in a ship or vessel called *Charles*, whereof John Morrissey is master, from Cuba, the undermentioned goods, namely, as per Warrant 660, the duties in respect whereof amounting to seven hundred and forty-two pounds ten shillings have not been paid, and the payment of which duties he is desirous of securing pursuant to law.

Now the condition of this obligation is such, that if the full duties aforesaid, due and payable on the importation of such goods, be paid to the Receiver General or other proper officer at the said port of St. John's within four months from the date of the first entry thereof, then this obligation to be void, otherwise to be and remain in full force and virtue.

(Signed),

WM. M. BARNES, [s. s.]

"

THOS. N. MOLLOY, [s. s.]

ALEX. MITCHELL, [s. s.]

Signed, sealed, and delivered, }  
in the presence of

HENRY BARNES.

And he saith that he signed his name to the paper whereon the said alleged writing obligatory is written and printed, but he did not seal or deliver the said alleged writing obligatory, and at the time he so signed the same it was a paper wholly in print save the name "W. M. Barnes," in writing at the foot thereof, and at the same time the following words amongst others, viz: "Wm. M. Barnes, Thomas N. Molloy and Alexander Mitchell, all of St. John's, merchants," and the sum mentioned therein "two thousand two hundred and twenty-seven pounds ten shillings," and the words "as per warrant 660," and the words "seven hundred and forty-two pounds ten shillings," were not written, printed or contained in the said writing obligatory, and the said parts were afterwards added and inserted without the defendant's assent or authority after he had so signed his name, wherefore the defendant saith that the said writing obligatory is not his deed.

R. J. PINSENT, Counsel and Attorney for Defendant.

23rd November, 1864.

The questions you have to determine under this issue are, first: Was the instrument sealed when signed by Molloy? and secondly: If so, was it given with defendant's assent or authority for the sum of £742 10s. stg., claimed by the plaintiff in this action, or for an unlimited sum?

The evidence of assent or authority is that given by Mr. William Barnes, that the bond was signed and sealed in blank

by Molloy without any sum being stated or inserted at the time; that Molloy had signed one or two other bonds in blank for him before, that he filled up the amount, names and other matters written in this bond afterwards, and that such was the practice in several leading houses, though he would not say the general practice of the trade with reference to bonds of Customs' duties.

On the other hand, the defendant, in support of his second plea that the amount and other written matters in the bond were inserted without his assent or authority, has testified that it was not sealed when he signed it; that when signed by him it was a mere printed blank form of a bond with Barnes's name at the foot of it, and at the time of signing it Barnes told him he required his signature to it to get four or five punchcons of rum out of the bond stores, and it was under that impression he affixed his name to it.

Now, according to the evidence of the witness, whose name is put to the bond as a witness, it is clear that he was not present at its execution by the defendant, but simply put his name to it at the request of the employer (Mr. Barnes) in the absence of defendant. It was therefore, a bond, so far as defendant was concerned, without a witness, and the whole circumstances under which it was signed came out in evidence. The general principles of law are that it is not necessary for the attesting witness to be able to say whether certain blanks in a deed were filled up at the time of execution, for this will be presumed, and the witness generally sees nothing but the delivery, which the witness did not see in this case. And where a party executes a deed with a blank in it, which is afterwards filled up with his assent in his presence, and he subsequently recognizes the deed as valid, the filling up of the blank will not avoid it, for until the blank is supplied it is incomplete and *in fieri*—*5 Bing, 368*. But generally a deed executed in blank and left to be filled by another, who has no authority under seal is void at common law.—*6 M. and W. 200*. It is not contended that Barnes had any authority under seal to fill up the bond after defendant signed it, but that an authority was conveyed to him by the defendant under the circumstances already stated, though nothing was expressly said as to the amount for which it was to be given. Under the first plea defendant denies that this bond is his deed in point of law, and he relies upon the evidence given for the plaintiff, as well as for himself, to support that plea; but the really important point of the case is raised by his second plea as to the authority alleged to have

been given by him to Barnes as implied from all the circumstances. Mr. Canning, the Deputy Collector of Customs, has sworn that he took the bond from the importers (J. B. Barnes & Co.) of the goods taken by them out of bond for the duties payable by law thereon, believing it to have been a *bona fide* bond, regularly executed by the parties whose names were written to it, and if he had known that it had been signed by them before the bond was filled up he should not have taken it, and that he was not aware of any such practice as that of sureties signing Customs' bonds in blank though thirty years connected with the Customs. I shall read for you an illustration of the application of the general principles of law in such a case as the present, in some respects, as propounded by one of the most reliable of English judges.

[Here His Lordship read the opinion of Baron Parke, as contained in the case of ——— *6 M. & W.*]

While we have reserved to the defendant the objections which he has urged in point of law against the maintenance of this action, it is our duty to tell you that there are exceptions to all general rules of law, and that if this case come within any of the exceptions as laid down by the Court it will be your duty to find a verdict for the plaintiff, if you should be satisfied that the evidence will warrant such a finding. Now, although Barnes had no authority under seal from defendant—and I state this view, subject to the exception already taken for defendant,—if you believe that Barnes had authority from defendant under the circumstances given in evidence to fill up the bond for £742 10s. stg., or for any unlimited sum, and that defendant sealed the document, you will find a verdict for the plaintiff for the amount claimed. If, on the other hand, you believe that no such authority was given by the defendant to Barnes, you will in that case find a verdict for the defendant. The effect of the evidence is altogether for you, and it is for you to say whether you believe the statement made by Barnes or not, or whether you consider his evidence so shaken by the evidence of Molloy as not to justify you in relying on it. Fraud has not been pleaded, but even if it had been, where a surety being such in his bond pleads that it was procured by the fraud and collusion of the plaintiff and the principal, it is not enough to shew fraud by the principal unless the plaintiff was a party to it.—*4 M. & G.*, 44. You will bear in mind that the plaintiff in this case relies upon the position that Barnes, in filling up the blanks in the bond after the defendant had

signed it, and in his absence, was, in doing so, acting as his agent, constituted by implication from the circumstances of the transaction. There is no evidence of any subsequent recognition by defendant of the bond as valid after the blanks had been filled up. But you will weigh the whole of the evidence with care and deliberation in arriving at a conclusion, and if you should be of opinion that the plaintiff has established a right to recover upon the evidence, you will find a verdict for the amount sought to be recovered, subject to the opinion of the Court on the questions of law raised, which will be hereafter determined; if you are not satisfied that the plaintiff has made out a case, in other words, if you should be of opinion under the evidence that there was no seal to the bond when defendant signed it, and that it was filled up by Barnes without defendant's assent or authority, you will find a verdict for the defendant.

The jury retired, and, after a short deliberation, returned a verdict for defendant.

*The Attorney General for the Crown.*

*Mr. Pinsent and Mr. Hogsett for the defendant.*

### BYRNE v. POWER.

1864, *December*. BRADY, C. J.; ROBINSON, J.; LITTLE, J.

*Practice—Trespass—General issue, plea of what evidence may be given under—Question of title, how pleaded—Amendment of pleadings—27 Vic. Cap. 10.*

In an action for trespass when the only plea on record was the general issue—not guilty, the defence was not allowed to give evidence as to ownership, but the Court permitted a plea alleging title to be added to the record.

THIS was an action taken to recover damages for the destruction of a house situate on the White hills. Mr. Emerson opened the case to the jury and called Mary McDonald, who was examined by Mr. O'Mara. Upon her cross-examination Mr. Hogsett attempted to elicit testimony as to the ownership of the property upon which the trespass was committed.

Mr. Emerson objected, and contended that as the defendant's counsel had merely pleaded the general issue "not guilty," the only question for the jury was, whether the defendants had committed the trespass as alleged in the declaration or not? That

under the new Act 27 Vic. cap. 10, the general issue merely operated as a denial of the commission of the trespass, and not of the plaintiff's possession or right of possession.

Mr. Hogsett then asked to be permitted to amend the record and file a new plea.

Mr. Emerson objected, and contended that the section relative to amendment did not apply to the present case. That a party was only entitled to amend an error or defect on the face of the record, and in no way gave either a plaintiff a right to set up a new cause of action or a defendant a new matter of defence.

The Court held that the defendant had a right to file a new plea, but reserved the point. Mr. Hogsett then filed a new plea alleging the title of the property to be with the defendants, to which Mr. Emerson took issue and demurred.

The case was then proceeded with. Mr. Hogsett addressed the jury on the defence, and called several witnesses to prove that this house was the property of a Mrs. Cleary, who died last winter, and with whom the plaintiff had lived. That the roof had been blown off, and that it being uninhabitable the defendant (Patrick Power) had purchased it from John Cleary, a boy of sixteen years of age, for three dollars.

Mr. Emerson then addressed the jury, and having reviewed the evidence at considerable length, contended that the plaintiff was entitled to a verdict as no substantial matter of defence had been proved. That young Cleary had no right to sell this property, not having obtained any administration to his mother's estate. That even if he had been clothed with a legal title to the property it would not alter the case, and the plaintiff would be entitled to recover.

Hon. Mr. Justice Robinson summed up to the jury, directing them to consider the plaintiff in the character of a lodger, and to find only nominal damages, if they found any at all.

The jury after a considerable absence from Court, found a verdict for the plaintiff—damages five shillings.

*Mr. P. Emerson and Mr. O'Mara for plaintiff.*

*Mr. Hogsett for defendants.*

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1865, *July*. HON. MR. JUSTICE LITTLE.

*Insurance marine—Mutual Insurance Association—Action for contribution—Construction of rules—Damage to ship—Stranding, meaning of word in policy.*

A ship fitted out for the prosecution of the seal-fishery in Newfoundland, and whilst on her way to the ice-fields, struck either on a rock or on a projecting spur from an iceberg, (which itself was aground on some rocks and shoals out in the sea), during the continuance of a very thick snow storm, and there remained between one-quarter and half an hour. Whilst so lying she came in contact with the iceberg, and was thereby greatly injured. She was, however, afterwards brought safely into port.

*Held*—That this was a stranding within the meaning of that word in the policy and rules of the Club.

THIS action has been brought to recover the amount of the defendant's contribution, as a member of "The Mutual Insurance Society of Brigus," for a partial loss sustained by plaintiff as owner of the brig *Anzico*, insured by that club for £1,200, and valued at £1,700, under the rules of the club, which prescribed in No. 3 that "each member shall bear reciprocally the proportions of any total loss that may happen either at sea or in port arising from the winds, seas, rocks, shoals, ice, and all other dangers and accidents of navigation, &c., and also of such partial average loss as shall (with the necessary incidental charges) amount to at least 15 per cent. on the committee's valuation to the amount of £500; under that amount 25 per cent., if the vessel be stranded at the time of sustaining such partial loss, but not otherwise." The *Anzico* had been insured by that society for six years, the certificate extending from the 25th Feb. to the 15th Dec., yearly, including the year 1864. On the 29th Feb. in that year she left Heart's Content in Trinity Bay, under the command of the plaintiff, bound to the seal-fishery, in good order and well found in all respects for the prosecution of the voyage. She ran down the bay, the weather became stormy and she tried to make Catalina, but was prevented by ice. She was then hauled off, her top-gallant sails were taken in, her foresail reefed, and her course shaped N.N.E. on her voyage. About two o'clock on the following morning the vessel struck on the forefoot. There was a very thick snow storm, it was blowing very hard, and there was a good tumble of a sea at the time. She struck amidships and remained there between one-quarter and half an hour, and came in contact with an iceberg. The bowsprit, foremast, mainmast to the masthead, and the yards, all came down to the board. After

they had come down she bounced from that and struck under the cabin floor, and then got off. The berg was aground on the Harry rocks lying off the Bonnavista shore, where the water is shoal, there being only about nine or ten feet on the Harries. She rested either on the rocks or on a spur from the ice island, which must have been aground. While lying around she came in contact with the island, and that was the cause of the damage. The vessel was then with difficulty kept free, as she began to leak badly; jury-masts were rigged, and by great and commendable exertions on the part of the master and crew, she was brought into Catalina, from which place she was towed to St. John's by a steamtug, when she was repaired and proceeded on her voyage. The gross expense incurred to repair the damages was £661 8s. 4d., from which one-third was deducted on the new for the old materials, reducing the amount to £461 11s. 10d., but the plaintiff being his own underwriter for £500, as the club only insure £1,200 on any vessel, and she was valued at £1,700, five-seventeenths would have to be also deducted, and the actual amount the club were called on to pay is £325 16s. 7d. The facts above related are taken from the plaintiff's evidence.

The cause was tried by special jury in the last term of this court, and the claim was resisted on the ground that the club were not liable for any partial loss unless it arose from stranding, and that the facts in this case did not show that in law there was a stranding of the brig. The question of liability apart from stranding was reserved for the opinion of the Court, and the jury were directed to say whether, according to the evidence, the damage arose in consequence of the brig having been stranded, that is, being fixed either upon a rock, shoal or part of an iceberg then aground, so that her onward progress was stopped from fifteen to thirty minutes. If she was so stranded they would find for the plaintiff; if not, they would give a verdict to the defendant. They found a verdict for the plaintiff for \$21.65, being the defendant's contributed share, and, in reply to a question from the Court, they stated that in their opinion the stranding took place on part of an iceberg aground. Upon the argument of the *rule nisi* for a new trial, on the grounds of misdirection and a mistake of a witness for the defendant in giving his evidence, it was contended by the defendant's counsel that the verdict was wrong, as in law a vessel could not be said to have been stranded on an iceberg, though it may have been aground—that no authority of any

decided analagous case could be found in the books, and that the meeting with an iceberg was a necessary incident in the seal-fishery; that the verdict could not consequently be sustained on that ground, nor on the ground of a partial loss, as the club were only liable for such a loss if the vessel was stranded according to their view of the rules. Now, the first question we have to determine is whether the evidence sustains the verdict according to the authorities on the point of stranding. The plaintiff swore that the brig grounded either on the Old Harry rock or on a projecting part of an iceberg, which was at the time aground on that rock or ledge of rocks; that she remained there from fifteen minutes to half an hour without making any onward progress; that on returning from his voyage on the 9th May following he saw the same iceberg on which or in contact with which the brig grounded, and it was then in the same place as he saw it on the 1st of March. I should have observed that, according to one of defendant's witnesses, the night of the 29th February was "a tremendous night of weather—very dirty, and he could not see the length of the jibboom ahead." The plaintiff, therefore, did not see the iceberg when his vessel was in her perilous position at two o'clock on the following morning, so as to be able to identify it distinctly again; but he swore that when the day cleared he saw it, and, according to the course and distance he had steered, he had no doubt that it was on that berg or one of the Harry rocks in the neighbourhood of it that his vessel grounded. The defendant's evidence went to show that the two icebergs seen by plaintiff and his witnesses were not so near the Harries as they had stated, and that if plaintiff's vessel came in contact with them she must have been out of her proper course. Upon the whole case there was evidence to warrant a verdict for stranding either upon the Harries or upon a ledge of a grounded iceberg. But, if on the latter, can it be upheld? What is the meaning of "stranding"? Bennecke, in page 469, says that in order to constitute a stranding it is not necessary that the ship should be driven on *shore* or upon a *strand*. It is sufficient that she be forced by some accident within the policy upon a fixed body in the sea or river, and remain stationary there for some space of time. In *McDougle vs. Roy. Ex. Ass., 4 M. & S., 403*, Lord Ellenborough says, if by the force of the elements she is run aground and becomes stationary, it is immaterial whether this be on piles, or a muddy bank of a river, or on rocks on the shore; but a mere striking will not do wheresoever that

may happen. Hopkins, on average, p. 136, says: "The course of the ship must be stopped a definite portion of time. But it is not of consequence that it be a long time, so that it be definite—absolutely a stoppage *pro tempore*. A quarter of an hour is sufficient, nay, a minute will suffice, if it can be shewn that the progress of the ship was stayed by some obstacle on which she rested. Neither is it of consequence on what particular substance she rests. It may be rocks, or stones, or sands, the shore of the sea or the bank of the river, it may be mud or a sunken wreck (if it be stationary—fixed to the ground), or a pile or the brick arch of a sewer projecting into the river." Again, in 2 Arnold on Insurance, p. 860, it is laid down thus:—"If," as Lord Ellenborough says, "it be mere touch and go" with the ship—if, that is, she merely touches on the projecting object (whether rock, bank, reef, or of whatever other nature) without remaining fixed upon it for some space of time—that will not constitute a stranding; if, on the other hand, she settles down on it in a quiescent state—it will.—*Dobson vs. Bolton, Park on Ins.*, 239; *Marshall on Ins.*, 231. Thus, in Dobson's case, where a ship ran aground on some piles placed in a river bed about nine yards from the shore in order to keep up the banks, and there rested till they were cut away—this was held to be a stranding. So, in *Baker vs. Towry, 1 Stark*, 436, where a ship was driven by a current on a rock and remained fixed there from fifteen to twenty minutes, it was held a stranding. It appears to us that an iceberg so sunk in the bed of the sea coast that it remains stationary for over two months may, with propriety, be comprised under the general terms "obstructing object" used by Arnold, or "a fixed body in the sea" used by Bennecke; and one can perceive no sound distinction in principle between grounding on such a body so resting in the bed of the sea and grounding on piles or on a sunken wreck. If for months this berg were as stationary as the Old Harry rock itself, it would seem strange that a vessel grounding on it, and thereby becoming a wreck, would not be entitled to indemnity, while another vessel stranded on the Old Harry rock in the vicinity would be entitled to claim for the damages done to her.

But, it has been said, as this vessel was on a sealing voyage she necessarily fell in with the ice, and perhaps grounded and got damaged on the berg, which being in the usual course of her voyage, as defendant contends, could not be the foundation of a claim by an ice hunter. Now, Judge Littledale says:—"But when the vessel is on the ground, or stranded in such a

situation as she ought not to be in while prosecuting the voyage on which she is bound, that is stranding within the meaning of the policy." But where the taking of the ground is in the ordinary course of navigation, and no more than is usual with vessels on the same voyage, it is not a stranding, though the vessel or goods are injured by it.—*1 B. & B.*, 388. In *Bishop v. Pentland*, 7 B. & C., 224, Mr. Justice Bayley says:—"A stranding may be said to take place where a ship takes the ground, not in the ordinary course of navigation, but by reason of some unforeseen accident." Now, upon the trial there was no evidence to show that it was usual for vessels engaged in seal-fishery to rest upon icebergs either sunk or afloat; they necessarily run into the ice and work their way through it as they best can, and icebergs are doubtless frequently met, and sealing vessels are often moored to them, but that is quite different from grounding on one in the open sea, for this is not "incident to the ordinary course of the navigation in which the ship is engaged," as Chief Justice Tindal expresses it.—*8 Bing.*, 864. Besides, we know that a higher rate of premium is always charged on vessels at the seal-fishery than on any other voyages, because of the increased risk consequent upon their encountering the ice and its perils. By their insurance the underwriters undertake to indemnify the assured against not only the perils encountered on other voyages, but also against the extraordinary perils peculiar to that enterprise. And it cannot reasonably be said to have been in the contemplation of the parties to this insurance that for vessels sustaining a loss such as the present, under such circumstances, the assured were to receive no indemnity.

As to the right of plaintiff to recover on the ground of a partial loss, apart from the point of stranding, though he is entitled to our opinion on it under the *rule nisi*, yet the necessity for it does not arise from the view we take of the principal question. I may, however, observe that the rules are ambiguous on the point, and though some doubt has been entertained by us, I should feel that the Court would be bound under the authorities to give the assured the benefit of that doubt. Rule 3 states that each member shall bear his share of any total loss, and also "of such partial average loss as shall (with the necessary incidental charges) amount to fifteen per cent. on the committee's valuation to the amount of £500,—under that amount twenty-five per cent., if the vessel be stranded at the time of such partial loss, but not otherwise." The meaning of

the terms particular or "partial average" loss used in this rule is defined in *Bennecke* 424 to denote "every kind of expense or damage short of a total loss. As between the assured and the underwriter it means losses of this description far as the underwriter is liable" In 2 *Arnold on Insurance*, 955, it is said: "In practice the term 'average losses,' without any addition, is frequently employed to designate all losses which in respect to their extent are less than total, and in respect to their cause and mode of compensation are distinct from general average; it is in this sense that the word average is used in the common memorandum" Rule 6 states that "in the event of a total or average loss by stranding or otherwise" what shall be done with the ship. Now, construing rule 3 with this rule, in which the same terms "average loss" are used, and seeing under rule 6 that it may occur "otherwise" than by stranding, this would seem to let in a partial loss arising from any of the perils insured against. Besides, rule 8 states that the certificate granted to the assured shall be security to the owners, and valid as a policy issued at Lloyds. Rule 10 specifies that in the case a vessel sustains damage at any time, she shall be specially surveyed. Rule 4 states that if a vessel in imminent danger of perishing be deserted, but regained by salvors, and not damaged to the extent of fifty per cent. on her original valuation, the owner shall take her again and the society shall pay the salvor's claims. But any vessel requiring at any season of the year fifty per cent. on her valuation to complete her repairs may be abandoned. In the face of all these references to partial losses it would appear to me that it cannot be fairly contended they are restricted to such as arise from stranding. At all events, if I entertained a doubt upon the subject, I should not be construing the certificate as valid as any policy issued at Lloyds, under which such partial losses as the present would be covered if the plaintiff did not get the benefit of it, and I think the underwriters should have guarded themselves from such claims, in express terms, if they so intended.

As to the mistake of the defendant's witnesses, we see no sufficient ground in that to disturb the verdict, as the plaintiff's evidence was quite strong and precise enough to support it without that evidence. We are not aware of any precedent to warrant such a course, and we think in this case it would be forming a bad one to do so under the circumstances. Upon the whole case we are of opinion that there has been no adequate reason shown to our satisfaction why the verdict should

be disturbed. The claim, in point of honesty and good faith, so far as the plaintiff has been concerned, has not been impeached by the defendant. He rested his defence on the law. We think it is against him. The rule must, therefore, be discharged.

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### IN THE INSOLVENCY OF GEORGE LANGMEADE.

1865, *July*. HON. H. H. HOYLES, C. J.

*Insolvency—25 Vic., Cap. 7, Sec. 22—Servant's wages, arrears of, how far preferential—Currency of year.*

On the insolvency of the master in the month of February, a servant claimed to be paid in full a balance due him as wages for the year terminating in the September preceding the insolvency. The master to whom the matter was referred held the servant entitled only to wages as a preferential claim from the commencement of his current term of hiring. On a rule for exceptions to the master's report,—

*Held* (confirming the report)—The words of 25 Vic., cap. 7, imply a preference only to something having a continuing existence at the time of insolvency, and could not apply to arrears of wages due outside the current year.

IN this case the master had reported in favor of the claim of John Hellyer, jr., a shipped servant of the insolvent, to be paid in full the sum of £8 6s 8d., being the amount of wages that would be due to him up to the time of the insolvency of his master in February last from the 3rd day of Sept., 1864, being the commencement of his current term of hiring, but had disallowed his claim to be paid in full the further sum of £20, being the balance due him on his wages for the year terminating on the 3rd of September preceding the insolvency; and Mr. Prescott Emerson, for the servant, having excepted to the report upon the last point, the question thus arising was argued on the 14th day of June instant by Mr. Emerson for the servant, and by Mr. Whiteway for the trustees.

After carefully considering the words of the statute 25 Vic., cap. 7, sec. 22, under which this question arises, the terms of the prior Insolvency Act and the arguments on both sides, the Court are of opinion that the exception must be disallowed and the master's report confirmed, because, first, the words of the section necessarily imply that the preference it gives is to something having a continuing existence at the time of the

insolvency; and secondly, because reason and grounds of public policy lead to the conclusion that it must have been the intention of the Legislature not to provide protection for arrears of wages, the payment of which might have been secured by reasonable diligence on the part of the servant, and thus to afford temptation and opportunity to master and servant to collude together in fraud of the general creditors; but to indemnify those servants whose wages not being due at the time of the insolvency, would not otherwise be recoverable, as well as remove from servants then in the actual employment of the insolvent an inducement clandestinely to appropriate any part of his estate in satisfaction of their own claims.

The Court are moreover of opinion that the case being one *primæ impressionis*, the costs of its determination should be borne by the estate.

*Mr. P. Emerson* for servant.

*Mr. W. V. Whiteway* for trustees.

## NFLD. MARINE ASSURANCE CO. v. DAVID SCLATER.

1865, July. HON. MR. JUSTICE ROBINSON.

*Bond—Surety—Insurance Company shares—Construction of Act incorporating company—Powers of directors as to renewal of surety bond.*

An Act incorporating the Newfoundland Marine Insurance Company recited that "Every shareholder shall give to the directors good and satisfactory security, either by bond and mortgage on real estate, or otherwise, renewable at least as often as once in every year, unless secured on real estate, and oftener if the directors shall require." The defendant became surety by executing a bond guaranteeing the payment of the residue of the calls on certain shares held by one Thomas, failing payment by him. Thomas died and his estate was declared insolvent. In an action against the defendant surety for the call on the shares, the defence set up was that the bond was inoperative from not having been renewed under the provisions of the Act of incorporation.

*Held*—The company was under no obligation to cause the bonds of sureties for shareholders to be renewed year by year. Such bonds were operative beyond one year. The power with which the company is invested to call for a renewal of the bonds is permissive not compulsory.

THIS matter comes before the Court upon the following special case, stated and submitted by the parties:

112 NFLD. MARINE ASS. CO. v. DAVID SCLATER.

SUPREME COURT.

THE NEWFOUNDLAND MARINE ASSURANCE COMP'Y, PLAINTIFF, vs. DAVID SCLATER, DEFENDANT.

It is ordered by and with the consent of the parties to this suit, that the parties do state the facts of this case in the form of a special case for the opinion and determination of the Court according to the statute.

(Signed),

M. W. WALBANK, C. C. and Reg.

St. John's, June 2nd, 1865.

IN THE SUPREME COURT.

THE NEWFOUNDLAND MARINE ASSURANCE COMP'Y, PLAINTIFF, vs. DAVID SCLATER, DEFENDANT.

The following case is stated for the opinion of the Court, under a rule of this Court, dated the second day of June, A. D. 1865.

On the 30th day of December, A. D. 1862, William Thomas was the proprietor of forty-five shares in the capital stock of said company, of twenty-five pounds each, upon which five pounds on each share had been paid. On said 30th day of December the defendant and said William Thomas executed a bond to the plaintiffs hereto annexed.

That the plaintiffs were incorporated under 15th Vic., cap. 12 ; that on the 15th day of February, A. D. 1863, a call was made on the shareholders in said company of five pounds per share, and the said William Thomas paid the plaintiffs the sum of £225, being £5 per share, on the said forty-five shares.

That said bond was not renewed. That on the 5th day of December, A. D. 1863, the said William Thomas died (probate admitted), and on the 22nd day of June, 1864, the estate of said William Thomas was duly declared insolvent, and trustees were appointed to realize and distribute said estate according to the provisions of the Act 25 Vic., cap. 7.

That on the 10th day of January, A. D. 1865, a further call was made on the shareholders in the said company of five pounds per share, payable on or before the 13th February, 1865.

That on the 22nd day of April, A. D. 1865, an action at law was instituted by the plaintiffs against the defendant *on the said bond*, on account of the non-payment of £225, equal to \$900, being the amount of said last call of five pounds per share made on the 10th day of Jan., A. D. 1865.

The question for the opinion of the Court is, whether the plaintiffs can recover against the defendant as such surety on said bond ; and whether the same is not inoperative against the defendant from not having been renewed, as defendant contends it should have been, under the provisions of the Act of incorporation.

The judgment in this case not to be pleaded as in bar of any future action for other calls.

(Signed),

R. J. PINSENT, *Plaintiff's Attorney.*

"

F. B. T. CARTER, *Defendant's Attorney.*

*Know all men by these presents*, that we, William Thomas, of Liverpool, England, merchant, and David Sclater, of the same place, merchant, are held and firmly bound to the Newfoundland Marine Assurance Company

in the full and just sum of nine hundred pounds of lawful money of Newfoundland to be paid the said company ; for which payment to be well and truly made, we bind ourselves and each of us by himself, our and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated the thirtieth day of December, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas the said Newfoundland Marine Assurance Company has been duly incorporated by an Act of the General Assembly of this Island in that behalf, and the above bounden William Thomas, being the holder of forty-five shares of and in the capital stock of the said company, whereon calls or payments amounting to five pounds — shillings and — pence on each and every share pursuant to the said Act have been paid to the said company : and whereas the above bounden David Sclater hath offered and agreed to become surety to the said company for payment of the residue of the calls that may hereafter become due and payable on the aforesaid shares held by the said William Thomas :

Now, the condition of the foregoing obligation is such that if the said William Thomas, his executors or administrators, or some one of them, do and shall well and truly pay or cause to be paid to the said company the residue of the calls hereafter to become due and payable on each and every share by him subscribed, taken and held in the said company as aforesaid, in such sums and at such time as the board of directors thereof, having reference to the state of the business and affairs of the company, shall order and direct, pursuant to the aforesaid Act and to any bye-laws, rules and regulations of the said company in that behalf ; then the foregoing obligation shall be and become void, but otherwise shall be and remain in full force and virtue.

Signed, sealed and delivered }  
in presence of }

JNO. ROSCOE.

WILLIAM THOMAS,  
By his Att'y H. C. B. THOMAS.  
DAVID SCLATER.

Received 15th February, 1863, two hundred and twenty-five pounds (£225) currency, being an instalment of five pounds per share on the within-named forty-five shares of stock.

E L. JARVIS, *Secretary*.

This case was argued before the whole Court during the June term, and again before Mr. Justice Little and me on the 5th instant, by Mr. Pinsent for the plaintiff and by the Attorney General for the defendant.

All such contracts as that entered into by the defendant are to receive, for the benefit of the surety, a strict construction, so as not to be extended to matters not fully within the precise terms of the engagement—*3 St. Co. 105*—for this reason, that when undertakings of this kind are once entered into the surety has by our law, differing in this respect from that of some other

countries, seldom the means of relieving himself by his own motion from the responsibility he has assumed for another, however long may be its continuance and however much the circumstances of the parties may change.

It is a well established doctrine that a surety is entitled when he pays the debt to the benefit of all securities his principal has given, and that if the party guaranteed neglect to take any security or to perform any act which by law he was required to take or perform, and which would have benefitted such surety, the surety is by reason of such default relieved. It became therefore of great importance to consider whether the Insurance Company were by the terms of their act of incorporation under a legal obligation to cause the bonds of sureties to be renewed year by year—in other words, whether such bonds were operative beyond one year. The 4th section of the 15 Vic. c. 12 was relied upon; it enacts that every shareholder shall give to the directors “good and satisfactory security or securities, either by bond and mortgage on real estate or otherwise, at the option of the said directors, renewable at least as often as once in every year unless secured on real estate, and oftener if the directors shall require. That another ten per cent. on the whole of his shares shall be paid to the directors for the time being within twelve months of the passing of the act, and *that the residue of the whole amount of his shares shall be paid to the directors for the time being from time to time, and in such portions and in such manner as to such directors shall seem advisable.* The 24th section also refers to the 4th sec., and affords to the directors plenary remedies where there shall be a refusal or delay to renew the securities as aforesaid. Looking at the the whole of the section, and the continuing character of the liability therein prescribed, which is to be for the residue of the whole amount, we think that the sole object of the enactment was to provide for the safety of the company, and to invest them with a permissive power, not a compulsory one, to call for a renewal of the bonds when they should desire so to do; to hold otherwise would not only be at variance with the plain terms of the defendant's own bond, but would stultify the Act. Suppose in the present case on the expiration of a year Mr. Thomas was found to be in embarrassed circumstances, that would be the very contingency to guard against which a surety is required, and just the time when no new security could be found; yet it is contended that the old one would be relieved. We cannot agree to that view of the Act, and we

are of opinion that the provisions of the statute are merely permissive and not compulsory. — *York and North Midland Railway Co. v. The Queen*, 1 El. & B. 859.

At one time I entertained some doubt that the words in the 4th section, "bond *and* mortgage," required the company to take both, and if that were so the omission of the directors to take a mortgage would prejudice and therefore discharge the surety; but further consideration satisfies me notwithstanding the equivocal language used, that such was not the intention or provision of the Legislature.

It was also contended that Thomas's estate having become insolvent, and trustees appointed before the call which is the subject of this suit was made, the shares had ceased to belong to or be held by him, his executors or administrators, and that an assignment by operation of law had vested them in the trustees, for whom the defendant had never become responsible; the objection was a specious and ingenious one, but the words of the defendant's bond are full and unequivocal, guaranteeing "the payment of the residue of the calls hereafter to become due and payable on each share subscribed, taken and held by Thomas as aforesaid." Moreover the 21st section expressly enacts "that no assignment or transfer of shares shall be valid or effectual unless it be entered and registered in a book to be kept for that purpose by the directors." That course has not been followed or sought to be followed in regard to Thomas's shares, and we feel that this objection is not sustainable. — *Wilkinson v. Lloyd*, 7 Q. B. 27

I am ready to concede that this is probably one of those cases in which a man assumes a responsibility for his friend, which he believes he will never be required to discharge; but although we may feel sympathy for the defendant, we cannot relieve him contrary to law and to the rights of the plaintiff, and therefore judgment must be entered for the plaintiff for the sum of £225, equal to \$900.

*Mr. Pinsent* for plaintiff.

*Attorney General (Hon. Mr. Carter)* for defendant.

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1865, *July*. HON. MR. JUSTICE LITTLE.

*Bill of Exchange inland—Sufficient acceptance—Equitable assignment—Insolvency—Attachment—Practice—Interpleader.*

A contractor drew an order on the chairman of the Board of Works in favor of a creditor for £91 19s. 6d. When the order was presented the chairman had no funds of the drawer in his hands, but the order was verbally accepted and left with the chairman to be paid when in funds. Shortly after the chairman had funds of the contractor, but on the day the funds came into his hands several attachments were placed upon it. The contractor becoming insolvent, a conflict arose between the creditor in whose favor the order had been drawn and the attaching creditors as to their right to the fund, the whole being insufficient to pay their demands.

*Held*—The order being an inland Bill of Exchange, and the acceptance not being in writing, was not binding on the chairman of the Board.

*Held*—The order did not operate as an equitable assignment. In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund, and there must be funds at the time the order was drawn.

THIS was an application made on behalf of Mr. P. Hutchings, under the Interpleader Act, for an order to pay to him the sum of £91 19s. 6d., being the amount of the following order drawn upon the chairman of the Board of Works:—"Sir, please pay Mr. Philip Hutchings, or order, the sum of £91 19s. 6d., currency, on my account. (Signed), William O'Grady," dated at St. John's, 14th March, 1865, there being in Court the sum of £163 paid in to the credit of several attachments laid in the hands of the secretary of the Board of Works on the 18th June last. The question we have to decide is whether that order created a lien on the fund or operated as an equitable assignment of so much of the fund in the chairman's hands as would satisfy the order. If so, the attachments would not avail against the order. It appeared by the evidence that when the order was presented the chairman said he had no funds of the drawer in his hands, but that when he would have funds he would pay the amount. There was no written acceptance, but the order was left with the chairman for the purpose of protecting the payee when the funds would be available. It further appears that the amount of the contract for building the light house on Brunett Island had been paid in full to O'Grady, the contractor and drawer of this order, but he had an unsettled claim on the Board for compensation in respect to a road which, he was given to understand by the Board, was completed when he took the contract, but which

was not really so, and he was thereby put to considerable additional expense in conveying materials to the site of the light house. This claim was allowed and voted by the Board about the 8th June last, and approved of by the Executive. On the same day, but after the approval, the several attachments referred to were issued by tradesmen engaged in building the light house, and placed in the hands of the secretary for the purpose of securing the amount of their wages. The secretary accordingly paid into Court the sum stated, and, O'Grady becoming insolvent, a conflict arose between Mr. Hutchings on the one hand, and the attaching creditors on the other, as to their right to this fund, the whole of it being quite insufficient to pay their demands. There was an attachment prior to the voting of the money which it is not necessary that I should notice.

This order is simply in the form of an inland bill of exchange, and an acceptance of it, to bind the chairman, should be in writing, under the 1 2 Geo. 4, c. 78, sec. 2, which enacts that "No acceptance of any inland bill of exchange shall be sufficient to charge any person unless such acceptance be in writing on such bill."—*Chitty on Bills*, 288. The chairman was not, therefore, bound in law to respond to this demand, and the secretary was, therefore, warranted on that ground in paying the amount into Court. But then it is contended that the claim in equity to the amount of the order is valid, as the order, it is said, operated as an equitable assignment of the sum it is drawn for. It will be observed that the order is general—to pay a stated sum on account of the drawer. It does not specify out of what fund it shall be paid. Now, "in order to constitute an equitable assignment there must be an engagement to pay out of the particular fund" Such is the law as laid down by the Master of the Rolls in *Watson vs. The Duke of Wellington*, 1 Russ & Milne, 605. He continues: "I am not at liberty to conjecture what might have been the intention of the parties except as it is to be collected from the expressions of the letter; and giving to the words of the letter their natural signification, I cannot there find any engagement on the part of the Marquis of Hastings to pay the debt out of this money." The same doctrine is laid down by the Lord Chancellor in *Brown vs. Carvalho*, 4 Mylne & Craing, 172, thus: "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so

much of the fund." In this case the chairman had no funds at the time the order was drawn; and secondly, as the order does not specify that it was to be paid out of any particular money or fund, we are both clearly of opinion that it does not operate as an equitable assignment of any portion of the money subsequently voted by the Board and paid into Court. How can it be said to assign a fund that it does not name or refer to? Any decision on the point in our courts was based, so far as my knowledge extends, upon the principle laid down in the case mentioned that the orders referred to the particular fund in express terms, out of which they were made payable. We, therefore, refuse the motion.

## ROBINSON v. THE QUEEN.

1865, *July*. HOYLES, C. J.; LITTLE, J.

*Practice—Appeal—Judges equally divided—Rule for second hearing of cause—Judge previously acting as counsel in case—Appeal to Privy Council where no formal judgment entered—Effect on appeal of judges being divided.*

In an appeal from the judgment of the Central Circuit Court on a special case stated, under 12th Vic., cap. 8, sec. 12, upon a petition of right preferred for alleged arrears of salary, due to the appellant as one of the judges of the Supreme Court of Newfoundland, a rule was obtained to set the case down for a second hearing. It appeared that in June, 1862, the appeal was brought on before the Supreme Court and argued when the judges were equally divided in opinion, Brady, C. J., being for the affirmance of the judgment of the court below, whilst Little, J., was for the reversing of the same. The court being thus divided no judgment was entered, and no further proceedings had until the application for a rule for a second hearing. On the argument it was contended for the appellant that no judgment on the former hearing could be entered, and, therefore, it was the duty of the Court to re-hear the case. Whilst on the part of the Crown it was submitted that the Court as constituted was not competent to entertain the application, one of the judges (Hoyles, C. J.), having been counsel in the case; and further, that the judges having delivered their opinion, though differing, the case had dropped and could not be heard a second time.

*Held*—There is no precedent in which a Court of Common Law, after once hearing a cause and adjudicating upon it finally, as far as such Court could do (the judges being equally divided in opinion), has re-heard the case. The equality between the judges in effect dismissed the appeal and affirmed the judgment of

the Court below, inasmuch as by such division the Court virtually refused the motion of the appellant that such judgment should be reversed.

*Held*—The absence of a formal judgment on record will not prevent the judicial committee of the Privy Council from entertaining an appeal.

*Held*—In order to prevent a denial of justice there is nothing to prevent a judge who has taken part in a case as counsel from adjudicating thereon.

In this case, which was an appeal from the judgment of the Central Circuit Court, on a special case stated under the 12th Vic. cap. 8, sec. 12, upon a petition of right preferred for alleged arrears of salary due to the appellant as one of the Judges of the Supreme Court, Mr. Pinsent, on the 23rd of May last, obtained a rule nisi, on behalf of the appellant, to set the cause down for a second hearing.

The circumstances of the case so far as they are material to the present proceeding, are that on the 13th June, 1862, it was brought before this Court on appeal, and set down for hearing in the July term following, when, being argued at length before the then Chief Justice Sir Francis Brady, and Mr. Justice Little, by Mr. Whiteway for the Crown, and by Messrs. Carter, Q. C., and Pinsent for the appellant, the Court took time to consider the question submitted, and on the 26th July delivered their opinions upon it; the Chief Justice pronouncing for the affirmance of the judgment in the Court below. Judge Little being of opinion that the judgment should be reversed.

The Court being thus divided no judgment was entered, and no further proceeding was had in the cause until the application for the present rule.

On the 27th of May this rule was argued by the Solicitor General and Mr. Whiteway for the Crown, and by Mr. Pinsent for the appellant before Judge Little and myself, the appellant of course taking no part in the hearing.

The counsel for the appellant contended that as no judgment had been or could be entered on the former hearing, it was the duty of the Court to re-hear the cause with the view to its final determination in some way. The counsel for the Crown contended, citing *Hickman & Co*, 3 C. B., N. S., and 3, *Modern Reports*, p. 156, that the case having been already heard, and (as they contended) adjudicated upon, by the judges formally, and by way of judgment delivering their respective opinions, no second hearing could be had, and that the case had dropped, and they further maintained that the court as now constituted was not competent to entertain this application, I having been

of counsel for the appellant in the court below. With regard to the last objection it is to be observed, that as the local Act 22 Vic., cap. 3, expressly requires that two judges shall be present at the hearing of appeals, and as the third judge of the court being a party in the suit cannot be one of these, there would be a denial of justice did I refuse to take part in the hearing and determination of this rule, and as the case of *Dimes v. the Grand Junction Canal Co.*, expressly determines, that in such an emergency a judge is bound to act even if he is himself interested in the result of the cause. We are clearly of opinion that however unpleasant it may be to me to have to act as judge in a cause in which I was concerned as counsel, I cannot, under the circumstances of this case, decline taking part in the proceedings.

The other objection raised by the counsel for the respondent against this rule being made absolute, is of a different character; and upon this, after much consideration, we are constrained to hold that as it rests with the counsel for the appellant who by this rule requires the action of the court to shew sufficient grounds and authority for such action; and as he has cited no precedent, and we, after a diligent search, can find none, in which a Court of Common Law, after once hearing a cause and adjudicating upon it finally so far as such court (the judges being equally divided in opinion) could do, has re-heard the case with a view to another disposal of it, and as moreover some of the authorities personally refused to appear impliedly to maintain a contrary principle, we find ourselves unable to accede to this application.

But although the present rule is discharged, it by no means follows that this cause must remain in its present state; as we think, that without offering any opinion as to the practicability of his adopting any other course, it is open to the appellant to take it for a final decision before the Judicial Court of the Privy Council; or should he decline to prosecute it further, that it will then be competent to the respondent to apply to the court below to discharge the rule for a stay of proceedings, thus in either case finally terminating this litigation as far as the tribunals of this colony are concerned, and we are led to this conclusion by the following considerations:

By the practice of the courts at Westminster as well before as since the C. L. P. Act, when the judges are equally divided upon a question submitted to their decision, the motion drops, (*Salkeld 17, 1, Camp., 468, Saunt. 7, 491, 3 Mod. Rep. 256,*

*Atkins and Drake, M. L. and Y., Levy & Green, G. Ellis, J.B.C., Demsey & Richardson, 3 Ell., J.B.C.)* unless as was sometimes done under the old practice, 7 San., 491, and as is very commonly done under the C. L. P. Act.—*Bioness v. Trustees of the Bedford claims, L.F. 28, L.B. 215, Brunett & Allan, 4 Fur. N.S., 790, Ex.* One judge withdraws his opinion to enable either party to carry the case further. This practice, however, seems subject to the qualification, that where there is any precedent determination of law or fact, such determination, except where the rule on which the division takes place, contains an express stay of proceedings, as in *Salkeld, p. 17*, or where the case is one of a special verdict (*sec. 8, Saint. 491*) remains in force and may be acted on. Thus in the case in 1 Camp., 458: On a motion to set aside a non-suit or points reserved the court were equally divided and so no order, but the non-suit stood. So in 3, *Mo. Rep., 156*, a day being given to speak on motion in arrest of judgment, the court were divided two and two, the plaintiff had judgment; so in *Salkeld* above cited. So it is laid down in *Arch. practice, pp. 545, 559*, citing 1 *Strange*, that where an error in the Exc. Chamber and in the House of Lords, the judges or the lords, as the case may be, are equally divided, the judgment appealed from is affirmed, although by the report of the case in *Strange* the practice in the Queen's Bench would at that time appear to have been otherwise, an appeal from the common pleas judgment being then given only by consent. So in the modern cases of *Hickman & Co., Law Mag for Nov., '58, p. 198.* and *Levy & Green, 30, Law Times, p. 241*, it was held that the judges in the E. C., having been divided in opinion on appeal, such division was such an affirmance of the judgment below as enabled the appellant to go to the House of Lords; and lastly in the case of *Williams vs. Byrne, Moore's P. C. cases 1863*, which was the case of an appeal from the Supreme Court of New South Wales—a court constituted by a charter in terms nearly identical with our own, and where two judges were divided in opinion on a rule to set aside a verdict for misdirection, Sir John Taylor Coleridge, in reversing the judgment of the Supreme Court, says:—"Upon the argument in that court, consisting of two judges only, it was equally divided, the verdict therefore stood, and judgment has been entered up accordingly."

Applying these decisions and the principles on which they rest to the present case, we regard the division between the judges in July, 1862, as in effect dismissing the appeal, and

thereby affirming the judgment of the court below; inasmuch as by such division the court virtually refused the motion of the appellant that such judgment should be reversed, and this placed him in a position to appeal to the Queen in Council against such refusal.

We are aware that cases are to be found (*re Levieu* 10 Moore; *re Mahon & Panente*, 2 Knapp,) in which the judicial committee have refused to permit an appeal where there has been no final judgment entered on record; but, upon examination these cases will be found to turn upon their own peculiar circumstances and the words of the instruments giving the appeal, and not to apply to a right of appeal so extensive as that given by our charter; and the observations of Mr. Justice Patterson in delivering the judgment of the Privy Council in *re Assignees of Manning*, 3 Moore, p. 154, plainly imply, not only that the division of the judges in this case is in effect a final judgment, but also that where a court below has done all that it can do towards a final judgment the want of a *formal* judgment upon record will not prevent the judicial committee from entertaining an appeal from a virtual determination of the cause. In the case now referred to, which was one of an appeal from a court of error in Antigua, on the ground of the refusal of that court to proceed to hear a cause when, as its members supposed, it was not duly constituted, and in which case no judgment had been entered in the court of common pleas, the original court from which the writ of error had been brought into the court of error in Antigua. Judge Patterson, in pronouncing the judgment of the Privy Council dismissing the application to that tribunal, says:—"If this case had rested entirely upon that which had been done in the court of common pleas, and this had been a writ of error from that court (supposing this had been the next Supreme Court of Appeal), a question might have arisen and might have deserved consideration, namely, whether that which was done in the court of common pleas, though not in form such a judgment as in the courts of this country would be given under the court, arrests the judgment by declaring that they give no judgment, and the parties may go without a day—it might be questioned whether this was not a mere informal mode of giving that sort of judgment; and, if so, and this court being the next immediate court of appeal, there would have been a fair ground to argue that this court might have reversed that judgment and have given such a judgment as ought to have been given; and for that purpose, therefore, it

would have been proper that leave should have been given to appeal. But the present state of the case is this, that this record has been carried to the next proper court of appeal the court of error,—thence the *judges have done nothing*, and the question now is, whether a writ of error will lie from that judgment in which they have done nothing, in which they have pronounced nothing that can be appealed from. In this respect the application would be in the matter of a mandamus calling upon them to proceed and to give judgment for which we find no precedent.”

We are further of opinion that in accordance with the course adopted in the case above cited from *Strange*, a formal judgment, in affirmance of the judgment below, can now, at least with the consent of the appellant, be entered, so as to conclude all question as to the right of appeal.

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MR. JUSTICE LITTLE:

I feel constrained by the recent authorities cited in support of the principal conclusion to which the Chief Justice has arrived in this case upon this rule, to express my concurrence in that conclusion, although I entertained considerable doubt on the subject for some time.

*Mr. Pinsent* for appellant

*Solicitor General* and *Mr. Whiteway* for the Crown.

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1865, *July*. LITTLE, J.; ROBINSON, J.

*Practice—Rule nisi for new trial—Judges equally divided, effect of—Practice for junior judge in such cases.*

On the argument on a *rule nisi* for a new trial, where the judges were equally divided (there being only two present at the hearing, the Chief Justice, Sir H. Hoyles, having been engaged in the case as counsel when at the bar), the legal effect under the authorities was held to be (Robinson, J., differing,) that the defendant was entitled to hold his verdict and sign judgment.

ACCORDING to the result of the application in the case recently disposed of in this court, Judge Robinson *vs.* the Queen, it was held that when the judges were equally divided on an appeal from the C. C. Court the appeal failed, and was dismissed thereby, and the judgment below stood; and also by reference to the authorities therein cited it is clear that the division of the judges on the present occasion on the *rule nisi* for a new trial, which contains no express stay of proceedings, allows the verdict to stand. The case of *Williams vs. Byrne, Moore's P. C., cases 1863*, which was an appeal from the Supreme Court of New South Wales, where two judges were divided in opinion on a rule to set aside a verdict for misdirection, Sir J. T. Coleridge, in delivering the judgment of judicial committee, says:—"Upon the argument in that court, consisting of two judges only, it was equally divided; the verdict, therefore, stood, and judgment has been entered accordingly." The local Act of the legislature prescribes that two judges are competent to decide on rules for new trials. Judge Robinson and I heard the argument on this rule; the Chief Justice declined taking any part in the matter as he was concerned as Attorney General for the Crown in the case, and he did not see that there was any necessity for him to take any part in it as he agreed with me in opinion that the difference in opinion between my learned brother and myself on the judgment would in law entitle the defendant to retain his verdict, and the right of the Crown to appeal from that verdict and the judgment thereon is undoubted. But, if any doubt should exist on that point, the recent practice is for the junior judge to pass his opinion, if requested, *pro forma*, for the purpose of enabling a party to appeal, and he usually does so, unless there be some substantial reason against such a course. Besides, it was known to the counsel on both sides that there was the same difference of

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\* Vide *Queen v. Molloy*, ante December, 1864.—[EDITOR.]

opinion between the two judges who tried the cause as that now existing, and it was with that knowledge they argued the case before them. It would certainly have been a great relief and satisfaction to me to have had the assistance of a third judge upon the matter. But, not having had it, the duty of the court is clear that, as the law empowers us, so it commands us, to dispose of the case and not keep it in slings for six months longer. No practical injustice can result from this course, and suitors are entitled to the law as it is. The Chief Justice foresaw the difficulty that has now arisen, and left the following note with me to use upon the present occasion as the expression of his views:—

JUNE 24TH, 1865.

MY DEAR JUDGE,—I hear the boat has been signalised, and I have only time to say that should the judges be divided in *Queen vs. Molloy*, and no order consequently made, the legal effect would be, under the authorities with which you are familiar, (in my opinion) that the defendant would be entitled to hold his verdict and sign judgment.

Very truly yours, in haste,

H. W. HOYLES.

I am, therefore, of opinion that we cannot delay our decision, as the result of such delay would, in the face of these facts, leave the case where it is upon the return of the Chief Justice, for he would probably give the same opinion in December next as that expressed in the note, and it was agreed that the case might be disposed of out of term.

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MR. JUSTICE ROBINSON:

I am unwilling that any judgment should be given on this rule until the court shall be full by the presence of three judges, because one party will have reason to be dissatisfied. A suitor is entitled as of right to the opinion of each of the three judges in a matter of this description, which is an objection to the ruling at the trial of one of the two now in court; and it seems to me very objectionable to attempt to dispose of this question in a court where only two judges are present and they differ in opinion—one of them being the judge whose ruling is questioned. See how the matter would work. I think the verdict was delivered under a misdirection by my brother judge, and a consequent misconception by the jury. Now, if through the means of a supposed rule of practice that verdict

should be affirmed on the opinion of one judge, and against the opinion of another, manifest injustice might be done to the plaintiff.

On the other hand, if the verdict should be set aside upon the technical ground that the last valid order of the court must stand (which is, that the verdict be set aside, unless cause shewn to the satisfaction of the court, meaning majority), which cause has not been shewn, a great wrong might be done the defendant.

The very object of constituting this court of three judges would thus be defeated. Under such circumstances our obvious duty seems to be to await the return of the Chief Justice to the colony, which will probably occur in a few weeks, and long before the next term.

I am aware that the Chief Justice would prefer not being required to give any judgment in this matter, because he was counsel for the defendant; but, however reasonable that feeling is, it cannot be indulged to the prejudice of a suitor or to the frustration of justice.

It is said that the party aggrieved may appeal to the Queen in Council, but in truth that is like the advice which used to be given in the last century, with grim humour, to seek relief in Chancery; but I think that before a suitor should be remitted to a remedy so ruinously expensive, he should have had the full benefit of the court of *dernier ressort* in the colony, where his suit should be disposed of according to substantial merits and law, and not on any technical advice.

*The Attorney General and Mr. Whiteway for the Crown.*

*Mr. Pinsent and Mr. Hogsett for defendant.*

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1865, *July*. LITTLE, J.; ROBINSON, J.

*Bond—Custom House Bond—Execution of, practice in—Usage of trade in—Authority to sign—Subsequent ratification—Practice—Rule nisi for new trial.*

In an action upon a Custom House Bond to recover from the maker the sum named in the bond being the amount of duties payable by the party for whose accommodation the bond was made and for whom the maker became surety, it appeared that the signature and seal of the maker was affixed to the bond binding him to the Queen for the penalty in the bond. The defence set up was (1) *non est factum*, and (2) a special plea to the effect that the maker did not seal and deliver the bond, that after signing it the amount of the bond and several additions were inserted in the same, and these alterations were made without his assent or authority. The jury found for the defendant. On a rule nisi for a new trial,

*Held*—By Little, J., (Robinson, J., differing,) a blank bond or deed is not valid to bind a party when the same has been filled up after signing, without subsequent assent or confirmation.

It is wholly void when important terms in a bond are blank to allow them to be afterwards filled up by an agent appointed by parol, and then to have the instrument in the absence of the principal delivered as a deed.

THIS action was brought to recover £742 10s., stg., from the defendant as one of the sureties on an alleged bond given to the Receiver General of this Island by William M. Barnes for duties upon merchandise imported by the firm, of which he was a member. To this claim the defendant pleads (1) that the alleged written obligation is not his deed, and (2) he set out the document, and says that he did not seal and deliver the said alleged written obligatory; and at the time he signed the same it was a paper wholly in print; saw the name W. M. Barnes at the foot thereof and at the same time the words "Wm. M. Barnes, Thos. N. Molloy, and Alex. Mitchell, all of St. John's, merchants," and the sum mentioned therein, "Five thousand two hundred and twenty-seven pounds ten shillings," and the words "seven hundred and forty-two pounds ten shillings," were not written, printed, or contained in the said alleged writing obligatory, and the said parts were afterwards added and inserted without this defendant's assent or authority after he had so signed the same, wherefore he says it is not his deed. The plaintiff took issue on these pleas, and the cause was tried before a jury in last December term of this Court. Upon the trial it appeared by the evidence for the crown as well as for the defendant, that the document declared on as a bond was

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\* Vide *Queen v. Molloy*, ante Dec., 1864, and July, 1865.—[EDITOR].

simply a printed form signed in blank by Wm. Barnes, the defendant, and the other surety, Mitchell; that none of the written parts, except perhaps the name of Barnes, were then in it, that it was not so signed by the defendant in his office. Barnes took it away, and, after getting Mitchell to sign his name to it, filled up the names of the defendant and the other surety as well as his own, and the sums and dates, and other written matters appearing in the body of the instrument, and his clerk then put his name to it as a witness, though he saw none of the parties sign, seal or deliver it. The filling up was done in the absence of the defendant and Mitchell, and no express assent or authority was proven from the defendant to Barnes to fill up the bond. But the Crown relied on certain circumstances to show that such authority was impliedly conferred on Barnes by defendant. Barnes swore that he said to defendant, "I think I said I was going to take some rum out of bond, I asked him to sign it; he did not ask me what sum I was going to put in it; I did not tell him what quantity I was going to take out; don't recollect that he asked me; I did not tell him what amount I was going to fill in; can't tell who was present; I had no further assent or authority from defendant to fill up the bond than his simply signing his name to it, and it has been the practice heretofore in the trade to sign bonds in blank; I don't say it is the general practice of the trade; I know it is the practice of some leading houses in the trade to have bonds signed in blank; I have so signed them myself and others have so signed them for me; it was sealed as it is now when defendant signed it; I did not misrepresent to defendant what the contents of the bond were to be; I made no representation to defendant but what I have already told, that I was going to take some rum out of bond; I think I have signed a blank bond for defendant, but I am not certain." Now, defendant, on the other hand, positively swears that there was "no seal to this bond when I signed it; it was perfectly blank except Barnes's name to it; none of the parts now in writing were then in it; I did not give authority to fill it up for any particular sum; Barnes laid it on my desk; I asked him what it was, or for what was it? He said it was for four or five puncheons of rum; I signed it; left it on the desk; he blotted the name and took it away; the duty on four or five puncheons of rum would be from £50 to £70, not over £70; I should not have signed such a bond for any one for £740, if I had known it; I also signed another bond in blank for him I think in

1863; I have signed bonds for others, but none in blank except the two for Barnes; I gave no authority to fill it up for four or five puncheons of rum; I signed it under the impression that it was to be filled up for the four or five puncheons of rum; I understood there would be a seal put to it before the party would make use of it." He also said he got no consideration for signing it, which does not affect the issue. This is the substance of the evidence on the main point. The bond when presented to the Receiver General, and as given in evidence on the trial, appeared to be complete in all respects, signed and sealed by Barnes, defendant and Mitchell, and it was received in payment of duties from Barnes, who became insolvent and unable to meet it, and recourse was then had to defendant for payment. The document when signed by defendant, as shewn in evidence, had merely Barnes's name at the foot of it, though he thought it may also have been then in the body, yet he would not swear it was, while defendant swore there was no writing in the body of it at that time. Mitchell signed it after defendant, and swore, though not certain, yet that he did not think there was a seal to it when he signed it. The form so signed was as follows:

Know all men by these presents, we are held and firmly bound unto our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in the sum of — of good and lawful money of Great Britain, so paid to our Sovereign Lady the Queen, her heirs and successors; to which payment well and truly to be made we bind ourselves, and each of us by himself, for, and in the whole, our heirs, executors, and administrators, and every of them, firmly by these presents; sealed with our seals; dated this — day of — in the — year of the reign of her said Majesty, in the year of our Lord one thousand eight hundred and —.

Whereas the above bounden has lately imported into the port of —, in a ship or vessel called —, whereof — is master, from —, the undermentioned goods, namely: The duties in respect whereof, amounting to —, have not been paid; the payment of which duties he is desirous of securing pursuant to law. Now the condition of this obligation is such, that if the full duties, as aforesaid, due and payable on the importation of such goods, be paid to the Receiver General or other proper officer at the said port of — within four months from the date of the first entry thereof, then this obligation to be void, otherwise to be and remain in full force and virtue.

(Signed),  
"

W. M. BARNES.  
THOS. N. MOLLOY.

Signed, sealed, and delivered, }  
in the presence of }

The issue was left by me to the jury in the following terms:

The questions you have to determine under this issue are—first, was the instrument sealed when signed by Molloy; and secondly, if so, was it given with the defendant's assent or authority for the sum of £742 10s. stg., claimed by the plaintiff in this action, or for an unlimited sum? The evidence of assent or authority is that given by Mr. Wm. Barnes that the bond was signed in blank by Molloy without any sum being stated or inserted at the time; that Molloy had signed one or two other bonds in blank for him before; that he filled up the amount, names and other matters written in this bond afterwards, and that such was the practice in several leading houses, though he would not say the general practice of the trade with reference to bonds for Customs' duties. On the other hand, the defendant, in support of his second plea alleging that the amount and other written matters in the bond were inserted without his assent or authority, has testified that it was not sealed when he signed it; that when signed by him it was a mere printed blank form of a bond with Barnes's name at the foot, and, at the time of signing it, Barnes told him he required his signature to it to get four or five puncheons of rum out of the bond stores, and it was under that impression he affixed his name to it. Now, according to the evidence of the witness whose name is put to the bond, it is clear that he was not present at its execution by the defendant, but simply put his name to it at the request of his employer (Mr. Barnes) in the absence of defendant. It was, therefore, a bond, so far as the defendant was concerned, without a witness, and the whole circumstances under which it was signed came out in evidence. The general principles of law are, that it is not necessary for the attesting witness to be able to say whether certain blanks in a deed were filled up at the time of execution, for this will be presumed, and the witness generally sees nothing but the delivery, which the witness did not see in this case, and when a party executes a deed with a blank in it which is afterwards filled up with his assent in his presence, and he subsequently recognizes the deed as valid, the filling up of the blank will not avoid it, for, until the blank is supplied, it is incomplete and *en fier*, 3 Bing., 368; but generally a deed executed in blank and left to be filled by another who has no authority under seal is void at common law.—6 M. and W., 200. It is not contended that Barnes had any authority under seal to fill up the bond after defendant signed it, but it is contended that authority was conveyed to

him by the defendant under the circumstances already stated, though nothing was expressly said as to the amount for which it was to be given. Under the first plea defendant denies that this bond is his deed in point of law, and he relies upon the evidence given for the plaintiff as well as for himself to support that plea; but the really important point of the case is raised by his second plea as to the authority alleged to have been given by him to Barnes, as implied from all the circumstances. Mr Canning, the deputy collector of Customs, has sworn that he took the bond from the importers (J. B. Barnes & Co.) of the goods taken by them out of bond for the duties payable by law thereon, believing it to have been a *bona fide* bond regularly executed by the parties whose names were written to it, and if he had known that it had been signed by them before the bond was filled up he should not have taken it, and that he was not aware of any such practice as that of sureties signing Customs' bonds in blank, though thirty years connected with the Customs.

I shall read for you an illustration of the application of the general principles of law in such a case as the present in some respects, as propounded by one of the most reliable of English judges. Here I read the judgment in *C. M. & W., 213*. While we have reserved to the defendant the objections which he has urged in point of law against the maintenance of this action, it is our duty to tell you that there are exceptions to all general rules of law, and that if this case comes within any of the exceptions as laid down by the court, it will be your duty to find a verdict for the plaintiff, if the evidence will warrant such a finding. Now, although Barnes had no authority under seal from defendant (and I state this view subject to the exception already taken for defendant), if you believe that Barnes had authority from defendant under the circumstances given in evidence to fill up the bond for £720 10s. 11d. stg., or for any unlimited sum, and the defendant sealed the document, you will find a verdict for the plaintiff for the amount claimed. If, on the other hand, you believe that no such authority was given by the defendant to Barnes, you will, in that case, find a verdict for the defendant. The effect of the evidence is altogether for you; and it is for you to say whether you believe the statement made by Barnes or not, or whether you consider his evidence so shaken by the evidence of Molloy as not to justify you in relying on it. Fraud has not been pleaded; but even if it had been, where a surety being such in a bond pleads

that it was procured by the fraud and collusion of the plaintiff and the principal, it is not enough to shew fraud by the principal unless the plaintiff was a party to it—4 *M. & G.* 44. You will bear in mind that the plaintiff in this case relies upon the position that Barnes, in filling up the blanks in the bond after the defendant had signed it, and in his absence, was, in doing so, acting as his agent, constituted by implication from the circumstances of the transaction. There is no evidence of any subsequent recognition by defendant of the bond as valid after the blanks had been filled up. But you will weigh the whole of the evidence with care and deliberation in arriving at a conclusion; and if you should be of opinion that the plaintiff has established a right to recover upon the evidence, you will find a verdict for the amount sought to be recovered, subject to the opinion of the court on the questions of law raised, which will be hereafter determined. If you are not satisfied that the plaintiff has not made out a case—in other words, if you should be of opinion under the evidence that there was no seal to the bond when defendant signed it, or that it was filled up by Barnes without defendant's assent or authority, you will find a verdict for the defendant. The jury found a general verdict for the defendant.

The Attorney General excepted to the charge on the ground of non-direction, that is to say, that the jury ought to have been told that the effect of defendant's signing the document in blank was, in law, an authority to Barnes to fill it up for any amount without reference to any limitation. Having obtained a *rule nisi* for a new trial on this point, which has been fully argued before Judge Robinson and myself, the Chief Justice declining to take any part in the case as he was counsel for the Crown in the cause at the trial, I regret that we have not been able to agree upon our judgment; but I am quite satisfied with the conclusion I have formed upon the case after the most anxious and careful consideration of the law, without a particle of feeling on either side, and with a single desire to see, as far as I am able, that my opinion rests upon reliable authorities bearing directly on the point involved. If I have erred in the judgment I have formed, it is satisfactory to me to know that an appeal lies to an ultimate court of appeal; and I shall be most happy to find, if it should be deemed expedient to resort to that tribunal, that I have failed to appreciate the true bearing of the authorities on the subject under consideration. There were two pleas on the record which were for the

jury to try, under the direction of the court, as to the law applicable to them under the evidence. The first plea denies that the alleged bond is defendant's deed, and the second sets forth particularly the facts on which he relies to shew that it is not his deed,—that what he signed was a blank form of a proposed bond, without a seal to it at the time, and that the instrument declared on was filled up without his assent or authority. The first inquiry the jury had to meet upon the evidence was one purely of a single fact, as to whether there was a seal on the paper at the time defendant put his name to it. If there was not, then it was not his deed, and he was entitled to a verdict on the first plea; for without a seal there can be no deed in point of law. The evidence, though conflicting, would warrant a finding in favor of the defendant on this part of the case. But instead of permitting the action to be disposed of on so purely a technical ground, it was thought proper to allow the both issues to be put to them separately and distinctly so that if they should be in favor of the defendant on the question of sealing they would then consider the main question in controversy touching the authority of Barnes to fill up the instrument as he had done. Upon the trial the Attorney General contended that the circumstances detailed in evidence created Barnes the attorney or agent of the defendant for the purpose of filling up the document in that way, and he also urged that the fact of defendant signing the paper as he did amounted in law to a conclusion that such an authority was thereby conferred. As a matter of fact, upon the evidence of the defendant (which was denied by Barnes) in general terms, it would appear that there was a positive fraud practiced on him by Barnes in filling up the bond for £742 10s., as he swears that Barnes told him he wanted to get five or six puncheons of rum out of the government bond stores, the duty on which would not exceed £70, and it was under that impression and with that understanding he signed the paper. He did not appear to have known anything of the transaction or the amount or other matters inserted in the document after he had signed it until the present claim was made on him by the Crown, and no subsequent assent or recognition of the matter has been shewn, but the demand has been met by the pleas on the record. The jury were, therefore, warranted in finding a general verdict for the defendant on both issues, looking at the case by a regard to the question of sealing and agency, in the ordinary way in which they would be considered by men of common intelligence

apart from merely legal inferences, or by the strictest application of the law to the facts, looking at the case in all its legal bearings. What was the substantial issue left to the jury on the second plea? It was whether the instrument had been so filled up with defendant's assent or authority. It was, in other words, whether Barnes was authorised by defendant to fill it up for £742 10s., or for any unlimited sum. This was a question of fact for the jury presented by the Crown upon the pleadings. I take it that if the authority could be inferred as a conclusion of law from the fact of defendant's having signed the blank form, issue ought not to have been taken upon the authority of Barnes so to fill it up, but the Crown ought to have demurred to the plea as insufficient in law, and the question would then be for the decision of the court, and taken out of the province of the jury; for we know that even in cases of estoppel, if the estoppel is not relied on in pleading, the jury would have the right to consider the whole circumstances. I do not pretend to say, in fact I do not think, however, that the result would have been different if that course had been taken, nor do I mean to say that it was a proper course under the circumstances; but I mention it as the course that ought to have been adopted to sustain the position of the Crown counsel upon their exception to the charge. If it was the duty of the judge to have told the jury that the defendant having signed his name to the blank form of a bond, as it is contended I should have done, the defendant would have been thereby precluded from questioning either the alleged fraudulent breach of faith, even if the Crown were aware of it at the time, on the part of Barnes in filling it up for £742 10s. instead of £70, or from showing the real nature of the transaction. Under such a direction they would have had nothing to do but to find a verdict for the plaintiff; and the plea, as well as the evidence adduced to support it, would have amounted to a useless form and mere surplusage.

I hold that no real analogy exists in law between a bond so executed in blank and an exchequer bill or a promissory note, a bill of exchange; for the latter have peculiar rights and privileges from their negotiable character under the law of merchants, which pertain to no other contract either simple or special. And it is not sufficient that under particular circumstances blank checks or bills signed by parties thereto should have been held good against them to warrant the conclusion that a blank bond or any other deed or specialty so signed

would be valid and effectual to bind a party or transfer an estate without any subsequent assent or confirmation after they were filled up. The solemnities of signing and delivering are necessary to the validity of a deed; and the Customs' Management Act, under which bonds are authorised to be taken to secure the payment of duties, the 27th Vic., chap. 2, sec. 31, under which this instrument purports to have been taken, states that bonds shall be taken in such cases from the importer and two sufficient sureties in the form D. in the schedule to this Act, which form prescribes that it shall be signed, sealed and delivered; and the 105th section makes bonds taken for duties a prior claim on the lands and effects of the persons executing such bonds in the event of their insolvency, thereby showing the importance attached to this security, and the consequent necessity for a substantial compliance with the statutable and common law requirements of such a special obligation.

It has been argued that this document while in the hands of Barnes was only an *escrow*, and might be altered or filled up as he pleased, either for £7,000 or £742 10s., or any other sum, and that the defendant having provisionally signed it, would be bound for the amount so inserted; and the case of *Millership and Brooks (6, Houlston and Norman)* is quoted in support of that position. Now, that was an action by a master against a surety for a breach of performance of duty by an apprentice. The surety signed the indentures and delivered them to the attorney of both parties, upon the understanding that the master was not to be allowed to sign them until an arrangement was made for the travelling expenses of the apprentice. These were not paid, nor did the master sign the indentures. The master brought his action for a breach of them by the apprentice, and the court decided justly that he could not maintain it because "the obvious intention of the defendant was that the deed should not be completed till an arrangement had been made with respect to the travelling expenses." I regard this as a strong authority in favor of the defendant in this case. for the court did not hold the surety to the indentures, simply because he signed them, but exonerated him, as the master had not performed the condition on which the surety executed them. In 1 Step. Com. 459, it is said a delivery may be either absolute, that is to the party himself, or to a third person, to hold until some condition be performed on part of the grantee; in which last case it is not delivered as a deed but as an *escroir*;

that is as a scrawl or writing which is not to take effect as a deed till the condition be performed; and then it is a deed to all intents and purposes. What was the condition here and who was to perform it? The condition was the delivery out of the bond store by the Receiver General of a quantity of merchandize, upon which the document as signed by the defendant would have its full legal effect. But if it was filled up or altered without his assent after he had signed it, so as to increase his liability or injuriously affect his position as defined in the document when he signed it, he would be thereby exonerated. The observations of Chief Justice Best in *Hudson v. Rivett*, 5, Bing, 388, that he begged not to be taken as deciding that if a deed be altered, with the consent of the parties, after it is executed, it is not to be considered as a good deed, and if all the parties assent to the alteration of a deed, it will, in its altered shape be a good deed, sustains this view. In that case the defendant executed a deed conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in a deed; a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the defendants' presence and with his assent. He afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife and by joining her in a fine to enure to the uses of the deed. Held that the deed was valid notwithstanding the filling up of the blank after the execution. And so should we hold in this case, if the defendant having signed the paper and after it was filled up recognised it and assented to the filling up of it, as Rivett did; but the blanks were not filled up in his presence, and he did nothing to recognise the deed as valid after they were filled up; on the contrary he repudiated the deed, as fraudulently filled up for a greater sum than he undertook to become surety for. So that *Hudson v. Rivett* does not appear to help the Crown.

In 1 *Step. Com.* 461, it is said a deed is void for want of proper parties and a proper subject matter, or of sufficient and legal words, or of sealing, and by the statute, in most cases, signing also, or for want of delivery.

In *Addison v. Cost*, 42, it is laid down that if material blanks purposely left in a deed are filled up after a deed is executed with the assent of all the parties to the instrument, the deed must be redelivered.—9 *East*, 354, 5 *Bing*, 368, 4 *Bing*, 123. *Keele v. Wheeler*, 13 *Law, J.C.P.*, 170, 8 *S.N.R.* 323. Again, in

*Squm v. Whitten*, 1 Ch. E. Ind., 427, published in 1853, it was held that an instrument purporting to be a bond executed by the obligor with blanks for the name of the obligee and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party. In this case neither the names of the obligee nor the sums were inserted when the paper was signed. I am not now going to inquire how far a Court of Equity would interpose to make good a clerical error in the omission of an obligor's name in the body of a bond which he had signed and sealed, as in *Crosbey v. Middleton*, 3 Ch. Rep. 99. But I refer to *Squm's* case as a decision in equity to show that such omissions avoid the deed at law.

I come now to the principal case of *Hibblerwhite v. McMoorne*, 6 M. & W., 201, on the authority of which the charge to the jury in this case was made. I deem it conclusive, not only in support of the general principles on which the validity of deeds depend, but also a direct authority in point. I have seen no case in which it has been questioned either directly or indirectly. It was decided in 1840, and does not clash with *Hudson v. Rivett*, decided in 1829, and the name of Baron Park stamps the authority of the decision with the highest judicial repute. The plaintiff in that action sold to the defendant, *McMoorne*, a number of shares in the Brighton Railway Co., which were required by the Railway Act to be conveyed by writing under the hands and seals of both parties. The plaintiff had purchased a number of shares from one *Pritchard* which were the shares he intended for defendant. *Pritchard* executed a deed under seal of the shares, leaving blanks in the deed for the name of the vendee and for the purchase money, which the broker offered to fill up according to the plaintiff's agreement with the defendant. But the defendant refused to fulfil his contract. The shares were re-sold by the plaintiff, and this action was brought for the difference between their sale price and what the defendant agreed to pay for them. The claim was resisted, the conveyance tendered being void at common law, as there was a blank in it for the name of the transferee. Nearly all the cases cited on the present occasion were cited on that agreement. It should not be forgotten that this case comes also within the statute of frauds, as this bond was given as a security for the debt of a third party. But what does Baron Park say in his able judgment? Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out, and to allow it to be afterwards filled up.

by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle that an attorney, to execute and deliver a deed for another, must himself be appointed by deed. The only case cited in favor of the validity of a deed in blank, afterwards filled in, is that of *Texira v. Evans*, where Lord Mansfield held, that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But the case is questioned by Mr. Preston in his edition of *Shepp Touch*, 68, "as it assumes there could be an attorney without deed," and we think it cannot be considered in law. On the other hand there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up. *Com. Dig. Fait, A. I.*, it is said: "If a deed be signed and sealed, and afterwards written, it is no deed." To the same effect is *Shepp. Touch*. 54. In *Weeks v. Malliard*, 6, the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of execution, and it was held that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail bond was executed, and a condition afterwards inserted, it was held bad as a bail bond.—*Powell v. Duff*. The cases cited on the other side were all of them distinguishable. In one, *Hudson v. Revett*, a blank in a part material was filled up, as to him the deed was complete; in a third, *Matson v. Booth*, the point decided was that a complete bond was not rendered void by the subsequent addition of another obligor with the assent of all parties. It is unnecessary to go through the others which were cited on the argument. It is enough to say that there is none that shows that an instrument which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed, by being completed and delivered by a stranger in the absence of the party who executed and unauthorized by instrument under seal. In truth this is an attempt to make a deed transferable and negotiable, like a bill of exchange or exchequer bill, which the law does not permit."

For all these reasons I am of opinion that the exception taken to the judge's charge is untenable, that the filling up of the bond or instrument by Barnes after defendant signed it

in his absence and without any authority from him under seal and without any subsequent assent or confirmation thereof by him, was improper and invalid, and that the defendant is not bound thereby. The verdict will therefore stand, and let the rule *nisi* be discharged accordingly.

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MR. JUSTICE ROBINSON:

Taking into consideration the fact that this court is the *dernier ressort* in the colony, and that three judges constitute it, I do not think that any technical rule should be imported to cause judgment to be given in any case, except with the concurrence of a majority; and that justice requires that matters should remain in *statu quo* until the Chief Justice, who has heard the argument, deliver his judgment.

Having relieved myself of responsibility by expressing, as I have done, my objection to this case being disposed of until three judges shall be present, and my brother Judge Little having now given his reasons for discharging the *rule nisi*, I must express those by which my judgment has been led to a different conclusion, lest by my silence I should be deemed to acquiesce in his opinion:

I have given to the questions raised in this matter much consideration, the result of which has been to remove any doubts previously entertained by me. When a definite opinion is to be formed during the hurry of trial upon involved questions of law, and the jury charged thereupon, it would be no matter of surprise that there should be some misdirection; and, therefore, I suggested then that the facts should be specially found in order that judgment might after proper deliberation be entered. But that course was not adopted; a general verdict was delivered for the defendant under the charge of my learned brother Judge Little, and the plaintiff obtained the following rule for the purpose of setting aside that verdict:

"It is ordered that the verdict in this cause be set aside and a new trial had on the ground of misdirection, unless cause be shewn to the contrary within four days.

"By the Court,

"M. W. WALBANK, C. C. & Reg.

"10th December, 1864."

The action was upon a bond to recover from the defendant £772 14s. stg., being the amount of duties payable, but not

paid, by Messrs. J. B. Barnes & Co. upon rum imported by them, for which payment, as is alleged, the defendant became surety. On the face of the bond the name and seal of Thomas Molloy appear binding himself to the Queen for the amount sought to be recovered by this suit. The defendant pleaded *non est factum* and a special plea, in which he alleged that he did not seal and deliver the said instrument; that when he signed it the amount and several other matters were not inserted, and that they were afterwards added without his assent or authority. On which pleas, thus *duplex* in their character, the plaintiff took issue.

From the evidence it appeared that at the time the bond was signed by the defendant it was in blank—that is, it was a printed form with no sum filled in; that having signed it he left it with Mr. William Barnes, by whom the amount was to be ascertained and filled up; and that, when Barnes completed it he delivered it to the collector on receiving from such collector a sufferance for his rum.

It also appeared in evidence that these instruments are known by the trade as "Custom House bonds"; that the common practice with merchants here has been to execute them in blank in the manner done by the defendant; not at the Custom House, or in the presence of any official, but at the merchant's private office; that the defendant himself had before this executed similar instruments in the same manner for Barnes and Co., and Barnes & Co. for him; and the defendant stated in his testimony—"When I signed the bond, Barnes might do what he liked with it." This practice in the Custom House of accepting bonds executed behind the back of the collector is sufficiently hazardous, and very unlike the practice that prevails in all courts where recognizances are entered into; but I suppose it was adopted in case of the trade, and it seems to have been well understood, for the assistant collector stated that during the thirty years he had been connected with the department this was the first time he heard of a bond of that kind being questioned. He saw Molloy's signature to the bond, and was induced by the act of the defendant to trust Barnes. Molloy asserts that Barnes told him he only wanted a bond for £50 or £70; which assertion Barnes contradicts, and declares that no amount was named by him or asked by Molloy. But, if the fact were as Molloy asserts, it would not affect the legal rights of the obligee to recover, provided such obligee was ignorant of that fact, because where an authority, which appears on the

face of it to be general, is given, a third party need not inquire as to private instructions; for the principal is bound whether such instructions are followed or disobeyed by the agent,"—23 *L. M.*, 10. Lord Mansfield said that "he who trusts must run the risk of his credit,"—2 *B.*, 1222; and if the defendant enabled Barnes to do that which Barnes did, the defendant cannot afterwards repudiate his own act and escape from a responsibility he voluntarily incurred. The Custom House authorities do not appear to have committed any *laches*, and the equity of the case seems to be with the plaintiff, who ought to have judgment, unless some inflexible rule of law intervenes to prevent such adjudication.

As regards bills of exchange, it is settled beyond controversy by numerous decisions that a party who signs his name to a blank bill stamp and delivers it to S., thereby authorizes S. to insert *any* amount the stamp will warrant,—1 *H. & B.*, 313; 2 *Dougl.*, 514; 2 *B. N. C.*, 553; and Lord Ellenborough sums up the whole doctrine in these words: "If a man is foolish enough to sign in blank, he must take the consequences,"—1 *St. Rs. England vs. Roper*. Now, is there any rule of law which forbids the same principle being applied to bonds? I do not believe there is, provided the blanks in the bond be filled up before that which technically gives efficacy to such sealed instruments takes place—I mean "delivery."

A deed when completed is avoided by a material alteration subsequently made without the assent of the obligor; so is a bill of exchange and so is every contract, upon this obvious principle, that no one is to be held responsible for more than his agreement. And in *Masters vs. Millar*, 2 *H. B.*, 143, the Lord Chief Baron McDonald remarks: "I see no distinction as to the point in question (alteration) between bills of exchange and deeds". I am sure that much of the difficulty of this case has arisen from confounding the act of signing the deed with its delivery, and from the indiscriminate and not always precise use of the word "executed." Sometimes a deed is spoken of as executed when it has only been signed; at other times when it is signed, sealed and delivered. It is, however, undeniable that a deed only takes effect from its *delivery*, and if the bond here had been delivered by Molloy as a complete instrument to the obligee any subsequent alteration or addition in it would have raised other considerations; but it was not delivered by Molloy to the obligee at all. Nor was it considered by him to be a complete instrument when he gave

it to Barnes; he knew that an addition was to be made to it, and therefore, his act was only *in fieri*. In my judgment there was not any *delivery* of this bond until Barnes delivered it at the Custom House in its completed form, on receiving the sufferance for his rum. Previous to that the instrument was an escrow, which is described to be "Where a deed is handed to a *third* party, but it appears from all the circumstances that something else is to be done before the party signing it is to be bound.—5 *H. & N.*, 800. In *Hibblewhite vs McMorine*, 6 *M. & W.*, relied on by the defendant, it was stated *arguendo* and not denied, "there are two classes of cases where deeds are held good after a subsequent addition, the one, &c, &c; the other, where at the time of the execution there is *something to be ascertained*, and is to be *filled up afterwards*." And Baron Parke, in the same case, adds "perfecting an incomplete deed is not an alteration,"—*p. 210*. In this case the amount of duties to be paid by Barnes was to be ascertained and then filled up in the bond; and it is trifling with common sense to suppose that it could have been considered as having any operation until a sum was written in, for that was the object and end of the transaction. No one would seriously contend that Molloy expected that a blank bond, with his name to it, was to be presented at or received by the Custom House. The authority of *Hudson vs Revett*, 5 *B.*, in its general doctrine, is well nigh conclusive upon the present case. The facts in that case shew an express authority more strongly than in this, but the general principles of law there are equally applicable here. There a deed had been signed and sealed with a blank for amount to be ascertained and filled up afterwards, and it was, after it had been so signed and sealed, handed to a *third* party to have that blank filled up; the blank was filled, and the validity of the deed was, in consequence, impugned by the party who had so signed and sealed it and had authorized the blank to be filled up. Its validity was, however, upheld by the unanimous opinion of the Court of Common Pleas. The whole of that case is pertinent to the questions now under consideration, but I shall only transcribe one passage from the judgment of Lord Wynford:

"I shall not travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding that if a deed be altered with the consent of all the parties after it is executed, it is not to be considered a good deed, I think if we were driven to examine that ques-

tion, it would be found that in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed it will in its altered shape be a good deed. But I do not decide this case upon that ground; I decide it on this, that it was no deed at all until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in which were to give it all its effect. I think we must take it, from what passed at the time of the execution, it was not to be considered as having effect till it could have its full effect, by all the sums being written in that were to be written in."

It is urged on behalf of the defendant that before Barnes could legally deliver Molloy's bond to the Customs' officer, he should have been appointed by deed for that purpose; but no authority for that position has been cited. It is true that the full execution of a sealed instrument, by an agent,—by which I mean sealing and delivery—is usually done by one authorized by deed; but I do not find it laid down any where that an agent merely to deliver a deed, already signed and sealed by the principal, must be so authorized. On the contrary, I find it laid down in *Shep. Touch*, 55—"a deed may be delivered by the party who makes it, or by any other person, by his authority or subsequent assent,"—even subsequent assent will suffice. *Hibblewhite v. McMorine* was relied upon for the defendant; as I read that authority it bears little analogy, and no resemblance, to this case; the main question there for determination was whether a transfer of shares which was signed and sealed by one party only fulfilled the requirements of a statute which expressly directed such transfers to be executive by both parties; moreover it is essential to the transfer of property that there should be a transferee in whom the estate should vest, and obviate the difficulty of the title remaining in abeyance; and in that case there was "a conveyance to nobody," 2 M. & G. 700, and Baron Parke declared such an one invalid; as to the obiter dicta, I do not find one observation of that learned judge, when read *secundum subjectam materiam* which conflicts with the conclusions I have reached in the present case.

My learned brother judge, Little, expressed to the jury a strong opinion that the bond signed and sealed in blank was void, and he submitted to them, whether the testimony given by the witnesses satisfied them that Molloy had authorised Barnes to fill up the bond for £742; and if it did not, they

should find for the defendant. Other issues were left to them, but that was the principal one—the finding of the jury under such a charge was, properly enough, a general verdict for the defendant; but in my opinion the learned judge was required by law to have gone further, and to have told them that the defendant might still be liable, although no witness should prove the express authorization of Barnes, because from certain given facts, if found, the law would infer authority. He did not do so, and the omission of the learned judge to inform the jury upon a point which really was the essence of the case, was in law and in fact as much misdirection as an erroneous direction. The recent trial in the English Court of Exchequer establishes that position. According to my view of the law the jury should have been directed that if the bond was not sealed by the defendant himself, there was an end of the present case; but that if it was, the fact of his having executed it in blank, and given it to Barnes to fill up and use as a Custom House bond would not render it void. I think they should also have been told that if they found the fact to be that Molloy had signed and sealed the bond in blank, and given it to Barnes to be filled up, and used by him as a Custom House bond, the law drew from those facts the inference, as regards an innocent obligee, that Molloy thereby authorized Barnes to fill it up for the amount inserted in it, and that for such an amount the defendant would be responsible to the plaintiff, unless the plaintiff knew that Molloy had limited the authority of Barnes, of which no evidence had been given.

I think there has been a misdirection, and that the law as well as the justice of the case requires that there should be a new trial, and therefore that this rule should be made absolute.

*The Attorney General* for the Crown.

*Mr. Pinsent* and *Mr. Hogsett* for defendant.

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1865, *July*. HON. MR. JUSTICE LITTLE.

*Arbitration—Award—Application for stay of proceedings under—Setting aside award.*

A Judge sitting in vacation granted a stay of proceedings on an award so as to permit the defendant to apply the following term to have the award set aside, where it appeared that the arbitrator had exceeded his authority in reserving to himself the right of naming a future day for the sale of property—a day having been fixed in his award for the sale of the same.

THIS is an application made on behalf of the defendant to me for a stay of proceedings on the award made by the arbitrator to whom this cause was referred, so as to permit the defendant to apply to the Supreme Court in the next term for the purpose of setting the award aside upon various grounds stated in the *rule nisi*. Having heard the Attorney General in support of the award and Mr. Prowse in opposition to it, and considered the several points raised, I have come to the conclusion to accede to the motion for a stay of proceedings upon the award until the next term of this court for the purpose stated. Without entering particularly into the grounds of the motion at present, as they will be discussed hereafter in open court, it is sufficient for me to observe that I consider the arbitrator has exceeded his authority in reserving to himself the right of naming at a future day after the making and delivery of his award a time for the sale of the property in dispute, in the event of its not being sold at the time specified in the award for a sale thereof; I will only remark that as all proceedings consequent on such an exercise of authority by the arbitrator, after he had ceased to be clothed with the powers conferred on him by law, would be affected by that act, provided the objection be tenable; it is, therefore, right that further proceedings should be stayed until the matter can be brought before the court for full and deliberate consideration, not only upon this point, but also upon all the grounds on which the defendant seeks to impeach the award. It is clear that I, as a judge sitting in vacation, cannot set aside the award, even if I thought the grounds sufficient to warrant that course; and it is equally clear that the submission must be made a rule of court before steps can be taken. As the cause is in court, and the submission is capable of being made a rule of court, I think, under the authority cited from Russell, I should give the defen-

dant an opportunity of moving on it in court, and for that purpose I therefore grant an absolute order accordingly.

*Attorney General* for plaintiff.

*Mr. Prowse* for defendant.

TRUSTEES OF ESTATE OF WILLIAM THOMAS *v.*  
THOMAS E. COLLETT.

1865, October. HON. MR. JUSTICE LITTLE.

*Practice—Capias—Setting aside—Affidavit of debt. sufficiency of—Insolvency Act—  
Sufficient averment of official character of Trustees.*

In an affidavit of debt upon which a *capias* is founded it is sufficient to aver that the plaintiffs are the Trustees of the insolvent estate ; there is no necessity to state the particulars of their appointment.

THIS is an application to set aside the affidavit, writ, and declaration in this cause, upon the grounds that the affidavit of debt on which the *capias* is founded, does not set out any appointment of the plaintiffs as trustees, nor shew any title in them, nor any sufficient cause of action, and that they have no title to sue the defendant, either under the order of court appointing them, or under the Insolvent law. Having fully considered the matter, I am of opinion that I should discharge the rule *nisi* ; first, because the affidavit of debt expressly states that they are the trustees of the estate of the said William Thomas, and under our Insolvent law, section 11, this is a sufficient averment without stating the particulars of their appointment. A title is thus stated to be in them. Secondly,—the affidavit of debt states positively that a part of the debt claimed is due by the defendant, and gives the circumstances in detail on which a large portion of it is founded—that the defendant received from Thomas's agent goods valued at \$1,500, to sell them as agent for Thomas ; that the deponent believes the goods have been sold by defendant, and that he has neither paid for the same, nor accounted for the sales either to Thomas or the trustees of his estate. Upon this affidavit, a judge's order was obtained for issuing of the *capias* for \$800. Mr. Whiteway contended, I consider rightly, on the authority of *Atkinson vs. Salembier & Dowl.* 493, that where the objection to the arrest

was the insufficiency of the affidavit, the application should have been to set aside the judge's order and not the *capias*; for the *capias* once set aside, the sheriff might thereby be liable to an action of trespass. Now this is simply an application to set aside the affidavit of debt, the *capias* and declaration, not to discharge the judge's order or the party from arrest. I do not see that I should be warranted in any authority I have seen in setting aside an affidavit admittedly good in part, and I will not say bad in part, for I am not called on in this view to offer a final opinion upon that part of the affidavit which relates to the goods sold by defendant as agent of Thomas; though I may say it would be difficult for the plaintiffs in their peculiar character as trustees to make a more precise affidavit than that made on their behalf by Mr. Henry Thomas, though probably it might have been fuller if the objection had been anticipated. Thirdly—the 11th sec. of the Insolvent Act authorises trustees appointed by the Court or Judge to sue in their own names for all causes of action for the benefit of the insolvent estate, and the 25th section relating to insolvent estates of deceased persons authorises the trustees of such estates to collect and distribute the estate or effects according to the manner of distribution by law directed to be made in respect to the estates of persons declared insolvent, subject in all cases to the provisions of this Act." Now, one of the provisions authorises the trustees of insolvent estates to sue in their own names, under section 11, and if the trustees of the insolvent estates of deceased persons could not sue in their own names, they could not have the rights nor consequently be subject to all the provisions of the Act. Nor could a trustee, appointed where there was no executor or administrator, sue in his own name, nor in any other person's, for a debt due to the deceased, if the provision in the 11th sec. did not apply to trustees appointed under the 25th section. I admit that without that provision they could not sue in their own names; and I own that the conclusion I have formed is one of first impression, as this is the first time the point has been raised on the 25th section of the Act. But being in furtherance of justice, any doubt I entertained on the point has been so far reconciled with my present conclusion, by taking the whole Act, and reading one part by a regard to the other parts of it, the apparent intention of the legislature is arrived at, which was to facilitate the recovery of debts by trustees of insolvent estates by taking actions in their own names. For these reasons I am of opinion that the rule *nisi* should be dis-

charged. I should be pleased, provided an opportunity occurred, if the question on the 25th section were raised before the whole Court upon a fuller discussion, for the purpose of receiving a more formal decision than it could have on a summary application before a single judge.

*Mr. Whiteway, Q. C.*, for plaintiffs

*Mr. Prowse* for defendant.

### WOODFORD v. FEEHAN.

1866, *January*. ROBINSON, J.; LITTLE, J.

*Insurance—Marine Mutual Insurance Club—Construction of rules—Abandonment—Absolute total loss—Constructive total loss—Partial loss—Practice—Rule nisi for non-suit or new trial.*

A ship insured for £1200 for the season under the rules of the Mutual Insurance Club, Brigus, went on shore at Frenchman's Cove, Fortune Bay, in Newfoundland, on a voyage from Sydney, being about seventy miles out of her proper course. She was abandoned shortly after by the master and crew, and, although injured but slightly, no attempt was made by the crew to get her off and no survey called, but she was offered for sale and sold for forty shillings. Some months after the vessel was got off and repaired. In an action for the insurance the jury found a verdict for the full amount holding there was a constructive loss. It appeared that no notice of abandonment was given. On a rule *nisi* for non-suit or new trial,

*Held*—The verdict must be set aside. The sale by the master did not nor did the other facts constitute an actual total loss, and if there was a constructive total loss, which would have entitled the assured to abandon, they could not recover for such loss not having given notice of abandonment.

*Held*—The owner under the facts was entitled to recover for a partial loss only, which would be measured by the expense of floating off and repairing the vessel.

MR. JUSTICE ROBINSON stated to the effect that in this case he and his brother judge were agreed upon some points, amongst others that the plaintiff was entitled to judgment, but differed as to the amount, and the principles on which the case ought to be determined; that yesterday they had a conference with the Chief Justice, who was unwell, and the Chief Justice authorized his brother judges to state that having been counsel for the defendant he had abstained and still desired to abstain

from taking any part in the adjudication of the cause. If, owing to the inability of the two judges to agree, his judgment should be required he would enter into consideration of the whole case and deliver his judgment on the first Monday in February, adding that the present leaning of his mind (without at all pledging himself to his future decision) was to diminish the amount Judge Little thought was payable to plaintiff by one-half the difference between that sum and the sum Judge Robinson thought payable, to which arrangement Judge Little declared his willingness to accede, but that he (Judge Robinson), having adjusted according to his view of the law, the full amount which the underwriters were legally bound to pay, he could not persuade himself that he had any warrant to concur in any arrangement to order more than that sum out of the defendant's pocket for the purpose of putting it into the plaintiff's. That both parties relied upon the law, which the judges were bound to administer according to the best of their power, not to bend or break it for the purpose of effecting a compromise which the parties could themselves effect if they pleased; but he advised, and his brother judges had concurred with him in the course they were now about to adopt, namely, that each of them should read his opinion (without giving judgment), and thus possibly enable the litigants to make a compromise with their own property, which the court could not, according to his view, properly order.

It was, however, an unusual course and by no means free from objection, but was adopted by the judges in consideration of the peculiar circumstances attending this case, of the large sum of money locked up from the plaintiff, and of the repeated applications of both parties that the cause should be determined.\*

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\* Immediately after the delivery of the following decision of Judge Robinson and of Judge Little, the parties settled the case by compromise.

#### HON. MR. JUSTICE ROBINSON:

GENERALLY it is desirable that in important causes the reason which influence the judgments of this court should be publicly given, and in the present case, which is one of a large number of claims arising out of the same transaction and to be governed by the same law, it is especially desirable that such a course should be pursued; this rule should be disposed of by a regard to those established principles which regulate contracts of insurance; for if, with a view of meeting the sup-

posed exigencies or hardships of particular cases the land-marks of the law are to be disregarded, I do not see how any one could conduct his business with safety, or appeal to a court with certainty, and we know how high an authority declares that few greater evils could afflict a community than uncertainty with regard to those rules which protect our lives and regulate our properties.

Under one of three contingencies can the plaintiff recover compensation from his underwriters for the loss of the *Rainbow*, insured for £1,200 in the Mutual Insurance Club of Brigus;—first, as for an absolute total loss, or secondly, as for a constructive total loss, or thirdly, as for a partial loss.

These several views were submitted by me to the jury, and they arrived at the conclusion which they reduced into writing and handed in—that the plaintiff had not committed any fraud, and that they found their verdict for him on a constructive loss for £1,200 and £115 interest.

No exception was taken to the charge, but the verdict is impugned as being unsupported by evidence and as excessive, and is sought to be set aside in the event of a preceding motion for a non-suit proving unsuccessful.

The alleged grounds of non-suit are that the 4th, 6th and 10th rules of the club (which rules practically constitute the policy) were conditions precedent, and were not observed by the defendant. An objection similar in principle was made with reference to the rules of the same club in 1859 in the cause *Rogerson vs. Spracklin*, and the judgment of the Supreme Court then pronounced governs the present case in respect to the legal effect of those rules. It is my opinion that none of the three rules above referred to constituted a condition precedent, being merely directory, and that there is not any ground for a non-suit.

But, although these rules do not constitute conditions precedent, the 4th rule materially affects the right of the defendant to abandon, and therefore to receive for a constructive total loss.

In considering whether the vessel was or was not an absolute total loss, regard must be had to the well understood rule of law in that behalf, which is “that where a ship is lost or destroyed, or captured or reduced to a mere congeries of planks, so as to exist no longer a ship, she is to be considered an absolute total loss,”—*Roux vs. Salvador*. “But the stranding of a

ship is not of itself to be deemed a total loss.”—3 *Kent, C. 323*. Now, how does that definition apply to the facts in the present case as they appeared in evidence? The vessel, in forty hours after they left Sydney, with a fair wind all the time, was found seventy miles out of her course, and run aground upon a sandy beach near Frenchman’s Cove, in Fortune Bay, on Tuesday night, 14th December, 1863. The captain and crew, in twenty minutes, lowered their boat and deserting their ship, went on shore. The following day, or day after that, the vessel was still on the sands, and no one in possession of her—she was then boarded again by the master and crew, who removed some of their clothes. No efforts were used to get her off, no enquiries made as to the possibility of doing so. She did not make much, if any, water more than she used to do; her masts, spars, sails and rigging (except one sail) were as sound as when she went ashore; no survey was held upon her or appraisal made of the damage, because, as the master alleged, competent persons were not there to be found; but on the next morning an auction was called in the same place, thus destitute of inhabitants, and the vessel and gear, valued at £1,200, with cargo on board, valued at £300, were all sold for 40 shillings. After she was sold, and the master had left the place, her anchors, chains, rigging, &c., were taken on shore and secured by the purchaser, and in the following summer she was floated off and repaired. That a vessel in such circumstances was an *absolute total loss* would sorely tax one’s credulity, and is more than the jury here believed, for they expressly found that the loss was a constructive loss, and how far that finding (irrespective of the want of notice of abandonment) is reconcileable with the evidence and law seems to me very questionable. It must be remembered that nothing short of imperative necessity will justify a master in abandoning his ship. Now the captain himself declares that the people behaved very well, desisting by his order from interference, the vessel was high, and at low water partly dry on the sands, and I am at a loss to discover what urgent necessity existed to justify him in deserting his post where such large interests were confided to his care; in my opinion it was his duty to have remained in charge of the property until he had received instructions from his owner or underwriters, and to have protected it for the benefit of whom it may concern.

Moreover, to warrant an abandonment, the assured must act as a prudent man *uninsured* would act. Thus, in the case of a

ship cast away upon the Goodwin Sands, the Lord Chief Justice of the Common Pleas instructed the jury "that they were to say whether, under all the circumstances, a man of prudence and discretion uninsured would have repaired her; for if he would the loss would be only partial."—*Young vs. Turing*, 2 M. & G. And in an insurance case heard on the 13th June last in the Queen's Bench, Mr. Justice Blackburn used these words: "From the time of Lord Mansfield it has been held that it cannot be allowed when the thing itself is not really lost to make it out to be so by artificial reasoning,"—*Kemp vs. Halliday*. In the present case it may well be doubted that the plaintiff or his agent would have thus abandoned the vessel to her fate, and have made no effort to save or repair her if she had been uninsured; and this I say without intending to impute any fraud to the plaintiff, whose conduct herein has not deservedly subjected him to any such imputation.

*Cambridge vs. Anderson* has been referred to because there is some similarity between the facts reported in that case and in this; but the verdict there turned upon the point that the loss was admitted a total absolute loss, and was so found, whilst here the jury have negatived that view and have found for a constructive loss.

And this brings me to the consideration of the question, was there sufficient evidence to justify that verdict? That will depend upon whether a proper notice of abandonment had been duly given, for such is indispensable; a party assured need not abandon unless he pleases, but if he elect to do so he must give to the underwriters a notice of his determination; and such notice, though it may be verbal and without any prescribed form in England, must be clear and unequivocal, not inferential or argumentative, but positive; and it must be given within a reasonable time after the assured acquires a knowledge of the loss. What is reasonable is rather for the judge than the jury.—7 E., 43 East, 563. Three days have been held reasonable, five days been held unreasonable—*Hunt vs. R. E. Assurance*, 5 M. & S. The object and effect of the notice is to transfer to the underwriters the whole title and interest of the assured in the wreck, so that they may be enabled to save all they can for their own benefit; and it is obvious that such object would be altogether defeated if the notice might be couched in terms of Delphic obscurity, so that the party giving it would be enabled to rely on or repudiate it as subsequent events might lead him to determine.

The doctrine is thus summed up in *Roscoe*, 315—"Stranding is not a total loss and may not be the foundation of any claim, but if the ship becomes thereby unnavigable by reason of the impossibility of getting her afloat, or the great expense of doing so, the loss may be converted into a total one by abandonment." And in *Faith v. Knight*, 15 Q. B., Lord Campbell reviews the authorities upon the subject and teaches me that in no case can there be a constructive total loss without a proper notice.

To prove that in the present case the necessary notice had been given, the plaintiff relied upon the fact of his having sent the protest to the underwriters, and upon a note written on his behalf by Mr. Carter, under date 20th Jan., 1864; it appeared that Mr. Carter had not been employed in the matter until several weeks after plaintiff knew of the loss had elapsed; whatever notice, therefore, that gentleman might have given could hardly have been deemed to be within "reasonable time"; but is the whole letter I underscore paragraph relied upon?

ST. JOHN'S, JANUARY 20TH, 1864.

MR. JONATHAN PERCY, *Secretary of the Brigus Insurance Club*:

Sir,—I am instructed by Captain William Woodford, late owner of the *Rainbow*, insured with your club, and lost on the 15th December last, the particulars of which are set forth in the protest of the master, which had been forwarded to you shortly after the intelligence of the loss had been received, to request you will favor him with an answer from the society or committee whether the insurance amount will be paid and when.

Captain Woodford is kept in a state of suspense until you inform him in this matter, which I need scarcely say is to him of vast importance.

Although he has requested me to address you, you should not infer from that any desire on his part to have recourse to legal proceedings, which he sincerely hopes may not be required.

*It is, of course, due to him that an answer should be given to his application for settlement on abandonment of the vessel.*

The steamer *Ariel* will leave this on the 27th instant to touch near scene of the wreck of the vessel, and your committee will perhaps avail themselves of such an opportunity if they think well of it.

Yours,

F. B. T. CARTER.

The former application to which Mr. Carter alludes is not in evidence, and we do not know, and, of course, cannot surmise, what it was, except that it was a request for a settlement, which, etymologically, would mean an adjustment of the amount that should be payable, rather than a demand of payment of an ascertained sum. In this letter Mr. Carter asks for an answer to the application for settlement on abandon-

ment. Now, I think that expression would ordinarily be understood to mean "when I shall abandon," or "provided I shall abandon." But whatever may have been the intention of the writer I feel that the language is altogether too obscure to meet the requirements of the law. In commercial transactions notices must be given in terms that exclude reasonable controversy as to their meaning. In *Thodhunter vs. Parmenter, 1 Camp.*, the broker required the underwriters to "settle as for a total loss and to give directions as to the ship and cargo." but Lord Ellenborough ruled that such a notice was insufficient, adding, "there is no implied abandonment by a demand as for a total loss, the abandonment must be express and direct."

Submitting the protest to the underwriters can in no case *per se* amount to a notice of abandonment; they would equally require to inspect that document whether the claim was for a partial, an absolute or a constructive loss. Such is the notice necessary to support an abandonment under the English practice, but the plaintiff has consented to circumscribe that practice by the special provisions of the 4th rule of the club to which I have before alluded, whereby he has expressly agreed that the notice (which in England may be, as we have seen, given verbally, and without any prescribed form and simply within a reasonable time) must here be given in writing, attested, and within three days. This is the 4th rule—"Should a vessel, deserted by her crew in consequence of being in imminent danger of perishing, be afterwards recovered and be found on a just appraisement to have sustained damage to the amount of fifty per cent. on her original valuation, the owner may abandon to the society; but if the vessel be not so damaged he shall take her again, and the society shall settle with the salvors for their interest in the vessel; but, if the owner does not abandon, it must be declared within three days after the particulars of the loss or wreck of the vessel comes to his knowledge. No vessel shall be abandoned at any season of the year but by regular attested survey, and upon it being found that it will require at least fifty per cent. on her valuation to complete her repair."

With whatever view that rule may have been specially framed, its language is general; it provides for abandonment at any season of the year, and seems to me to apply to the circumstances of this case. The vessel was "deserted by her crew"; she was "afterwards recovered" by master and crew, who resumed dominion over her before salvors or other persons had acquired any claim upon her.

I see nothing unreasonable in that rule, nor do I discover in the circumstances of this case sufficient excuse for the omission of the plaintiff to comply with it. If appraisers could not have been obtained at Frenchman's Cove, they surely might have been found at Grand Bank, or Garnish, or Burin; and where property of the value of £1,500 was involved, an attempt should have been made to procure them. At any rate the plaintiff has failed to comply with this rule of his club, as well as with the less onerous practice in England in regard to notice of abandonment, and he has not established in law his right to recover for a constructive total loss. I am sensible of the hardships that may sometimes arise from the owner having his rights jeopardized by the neglect of the master of his ship; but such master is his agent, and for his acts the owner is responsible.

There remains to the plaintiff his claim to recover for a partial loss, which in my judgment is well established, as it is less in amount than, and subordinate to, the verdict, and meets the justice as well as the law of this transaction.

From the evidence of Elward it appears that the expense of floating off and repairing the vessel amounted to £980, Newfoundland currency. And although, where an old vessel has been repaired by her owner with new materials a deduction of one-third new for old is made upon the presumption that the vessel becomes enhanced in value—that rule would hardly apply to the present case, nor is it at all applicable where the vessel is not delivered back to the owner again—*Da Costa vs. Newman, 2 T. R.* I think that in the absence of all evidence to show that the repairs could have been effected for a less amount, the plaintiff's partial loss may properly be estimated at that sum.

I have not forgotten that the above sum includes £125 purchase money paid by Elward for the hull, tackle and cargo, and that such a proportion of that sum as would represent the value of the hull might be deducted from the bill for repairs; but, on the other hand, it is contended on behalf of the plaintiff that he is entitled to be indemnified for his loss, and that the ship was worth more before she was wrecked than £960, having reference to her valuation in the policy. It has, however, been authoritatively determined that in adjusting a partial loss the valuation in the policy is *not* the measure of the plaintiff's interest, but the *real intrinsic* value before the vessel was launched, (*Young vs. Turing, 2 M. & G.*), on which point

there was not a tittle of proof. Still, considering that both parties belong to a Mutual Insurance Club, and that the valuation in the policy would be the rule by which the plaintiff's contribution to losses would be measured, it seems to me equitable that, bearing the burthen, he should enjoy the benefit of that rule so far as it is not contrary to evidence, and, as there is no evidence on this point, that the plaintiff should have the full allowance of £980.

The question of interest alone remains to be disposed of. In the exercise of their discretion the jury have expressed the opinion that the plaintiff is entitled to interest, and I think the court is bound to give effect to their finding, so far as it is sustainable by law, although, if I had been one of them I might not have concurred in that opinion—I thought at the trial, and I think still, that the unsatisfactory and inexplicable manner in which the vessel was wrecked, deserted and sold, abundantly justified the underwriters in demanding a sitting and judicial investigation, but the jury, I suppose, thought otherwise, and as it was in law competent for them to allow interest from the day on which notice was given, that it would be demanded, viz., 17th September, 1864; it is consistent with law to allow the plaintiff £58 10s. 4d., being fourteen months and ten days in interest on £980.

The result of the best consideration I can give the whole case is that the well established principles of law will be observed and the rights of both parties will be satisfied by the plaintiff reducing the damages to the defendant's proportion of £1,036 10s. 4d., cy., (\$4,154.4). And, as his counsel consented that the court should reduce the damages if necessary, judgment ought to be entered for that sum, otherwise the rule for a new trial should be made absolute.

*Attorney General (Carter) and Pinsent, Q. C., for plaintiff.*

*Messrs. Hogsett and Little for defendant.*

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1866, *January*. HON. MR. JUSTICE LITTLE.

*Trespass—Conversion of goods—Police officer—Costs.*

The court refused to allow a successful defendant costs when the action was against a police officer in an action for the conversion of goods.

WE are of opinion that the defendant, acting in his official capacity as Inspector of Police, in taking possession of the gold watch for which this action has been brought, was justified in instituting the most rigid inquiry into the manner in which it came to plaintiff's possession. But in point of law the plaintiff has a right to the watch. We therefore award the same to the plaintiff, but without costs, under the circumstances of the case.

MCKAY v. WOOD.

1866, *January*. HON. MR. JUSTICE ROBINSON.

*Contract—Acquiescence—Conflict of testimony.*

Where a party avails of extra passenger accommodation on board ship for which he is informed he must pay increased fare, he cannot afterwards escape from liability when he has not repudiated the proposed charge, even though it may not be clear that he had acquiesced in the same.

THE evidence given by the plaintiff and by the defendant conflicts in several particulars, but the weight of the testimony so clearly preponderates in favor of the plaintiff that we all think he is entitled to judgment even upon the defendant's own testimony.

The action is brought substantially to recover £9 stg., being half-fare extra on the passage money of the defendant in the steamer *St. George* hence to Glasgow in A.D. 1864.

Without adverting to collateral matters of minor importance on either side, the evidence of the plaintiff is to the effect that Mr. Wood was about to proceed to England, accompanied by his lady, and being in ill-health and unable to use an upper berth, he applied to plaintiff who was the agent of the *St. George*, to obtain for him a stateroom for himself, and if possible the one opposite Mrs. Wood's; that when the ship arrived here McKay found that every stateroom would have an occupant, and that one berth in stateroom 27-28 (which was opposite

Mrs. Wood's) was occupied by a gentleman from Quebec, Mr. Robb; that he spoke to Mr. Robb and induced him to exchange that for another berth and vacate it in favor of Mr. Wood; that plaintiff then introduced Mr. Robb to the defendant in the saloon, informing Wood that Robb had kindly consented to give up 27-28 to him, but that he, Wood, should be charged £9 stg. extra as half-fare, such being the usual rate where a whole stateroom is enjoyed by one person; that Mr. Wood declared himself quite satisfied with the arrangement and extra price, was much obliged to Mr. McKay, and desired him to send to Clift, Wood & Co's office for the whole passage money; that after the steamer sailed McKay did so send but was not paid the £9, Mr. Thomas Clift stating that Mr. Wood had left no orders to pay more than the usual fare, and that Mr. McKay, relying on the arrangement, remitted the £9 out of his own pocket to the owners at Montreal, and now seeks to recover it from the defendant. Mr. Wood, in his evidence, denies that he expressed to McKay his satisfaction with the extra fare, or that he ever agreed to pay it, but he acknowledges that the plaintiff did introduce Mr. Robb to him, and did tell him that he was to have Robb's stateroom, and would have to pay £9 extra, to which he, Wood, replied, "What, I shall see about it, and nothing more; he also admits that he had told McKay that he would not use an upper berth, and that he desired to have the stateroom next to Mrs. Wood, that Robb vacated that cabin in his favor, and that he used it exclusively all the passage.

The defendant having thus obtained what he asked for, and having enjoyed additional accommodation, it seems reasonable that he should pay some additional fare, and we all think that when he was distinctly told what that additional fare would be, he should distinctly have repudiated it, if he disagreed therefrom, and not have contented himself with an expression somewhat enigmatical, "I will see about it."

The state of Mr. Wood's health at the time and the confusion of the moment may readily account for some misunderstanding, but be that as it may, the testimony of the plaintiff being clear, and being supported substantially by the circumstances of the case, and materially by the evidence of the defendant, himself, we are bound to give judgment for the plaintiff for £9 stg.

1866, *January*. HON. MR. JUSTICE ROBINSON.

*Will—Execution of—Testator a marksman—Newfoundland Wills' Act,  
27 Vic., cap. 13.*

On an application by the executors of the alleged will of testator to admit the same to Probate after proof in solemn form, it appeared the testator had executed his will by affixing his mark in the presence of the two attesting witnesses, one only of whom had been present when the will was read over to the testator. There was a third person present, the executor, when the will was read over, but he did not sign the will, believing the executor was incompetent to witness. The testator was an intelligent man, and in the conduct of his business had kept his own accounts and carried on his own correspondence, but shortly before the date of executing his will, had become quite blind and incapable of writing. The admission of the will to probate was resisted by some of the next-of-kin, on the grounds that being executed by a marksman, it was not read over to or by him in the presence of the two witnesses who attested its execution.

*Held*—The will was not valid for want of due execution, and could not be admitted to probate, not having been read over to or by the testator in the presence of the attesting witnesses.

THIS matter comes before me on the application of Frederick R. Page, and J. G. Jeans, executors of the alleged will of the late William Menchinton, to admit the said will to probate, after proof thereof in solemn form.

The application is resisted by Mr. John Power, who is married to one of the daughters of deceased.

The facts are few and simple, and are uncontradicted; but the case is very important as exhibiting the operation of the new Wills Act, and the necessity of making its provisions generally known.

The testator died in June last, in St. John's. He had been an intelligent planter, and by his industry and acuteness had accumulated assets to the amount of about £5,000. He kept his own books of accounts, though in a homely fashion, and wrote his own letters. But a few months before his death he became quite blind and incapable of reading or writing.

While in that state he requested his friend, Mr. Page, to write for him his will, and to act as his executor, and gave Page the necessary instructions. Page accordingly prepared a draft, which he submitted, and read to deceased, who approved of it. The will was then engrossed. On the 28th April, 1866, Page took it to deceased, who was sitting on a sofa in his parlor. Page was accompanied by Mr. Jeans, whom he had requested to go with him to witness the execution of the will. Page and

Jeans expressed to deceased their opinions, that an executor could not be a witness to a will, and suggested to deceased that some person should be had in addition to Jeans as a witness, when deceased desired that Robert John Parsons, Esq., who was his next neighbour, should be sent for, which was done. Before Mr. Parsons came in, Page read to Menchinton, in the presence of Jeans, the whole will, paragraph by paragraph; and, after each paragraph, deceased signified his assent and approval. In about ten minutes after the will had been so read, Parsons came into the deceased's room, when deceased suggested that his will should be again read to Parsons; but the latter gentleman said he was in a hurry to go to the House of Assembly, and that he pretty well knew its contents. The will was not therefore read over, to or by deceased in the presence of Parsons. Menchinton was then led to the table, the pen was put into his hand, and he made his mark to his will in the usual manner that a marksman acts—putting also his finger on the seal and declaring the document to be his last will and testament, and his act and deed. All this he did in the presence of Page, Jeans and Parsons, and the two latter, in the presence of Page, signed the will as attesting witnesses. It was then put into an envelope by Page and handed to Menchinton who placed it in his iron safe. Some days after this transaction, Page seems to have doubted respecting the due execution of the will for want of it having been read in the presence of Parsons; and he—accompanied by Mr. H. Wood, the clerk in Mr. Walbank's office—went to Menchinton's house, where he saw deceased and his wife. Page then mentioned his doubts to Menchinton. Mrs. Menchinton took out of the safe the will in the same envelope, and handed it to Mr. Wood who read it in the presence of deceased, and made comments on it, when Menchinton again repeated that it was his last will, and made in accordance with his wishes. Mr. Wood observed that as Mr. Parsons was not then in St. John's, nothing more could be done. Nothing more was done, and the will was returned to the envelope and given back to the deceased. In the following June, Menchinton died, and after his funeral the will was taken from the same envelope, and read by Page in the presence of the family. The will divides his property amongst his wife and daughters, after giving a legacy to a faithful servant, and seems a righteous and reasonable distribution of his estate. The legacy to Amelia, his daughter who is married to Power, with the exception of £100, is absolutely bequeathed to her and settled upon her for her use during her

life ; and, on her death, upon her children if she leave any. At present she has no child, and if she should die without a child, her legacy reverts to testator's other children and is kept in his own family. There is not even an imputation raised by evidence or by counsel that the deceased did not thoroughly understand his will, and there is no room to doubt that all was in strict accordance with his wishes, and conducted with good faith and propriety. But Mr. Power resists the admission of the will to probate, and contends that it is null and void—because, being made by a marksman, it was not read over to or by him in the presence of the two witnesses who attested its execution, and he relies upon the first section of the 27 Vic. cap. 13, passed by the Colonial Legislature in 1864—which section is as follows :—

“ No will shall be valid unless it be made in writing, and unless it be either in the handwriting of the testator and signed by him, or if not so written and signed be signed by him in the presence of at least two witnesses who shall, in the presence of the testator, sign the same as witnesses ; and in case such will shall be made by a marksman, unless the same shall have been first read over to or by the testator in the presence of the said witnesses.”

It is true that the will was read over in the presence of two witnesses, Page and Jeans, who might have tested it, and were competent witnesses to have attested its execution, for it is altogether a mistake to suppose an executor is incompetent to be a witness, and it is equally true that deceased thoroughly understood its contents, and repeatedly acknowledged it as his will, and approved it ; but it is stoutly contended that the letter of this law has not been fulfilled, although the substance may have been fully observed, and that the paper, although it contains the well considered disposition by the deceased of the earnings of his life, must be set aside, because Mr. Page mistakenly but honestly omitted to testify by his signature the fact which it is not denied had really been performed, or because it was not read again before Mr. Parsons, after it had just previously been read before two other witnesses. Mr. Whiteway and Mr. Pinsent, on behalf of the executors, urgently press upon me that this is a new Act, and unsuitable to the condition of the country, and I should so construe the Act as to give effect to this will, whilst Mr. Little, for the opposing next of kin, candidly admits that the statute, as regards the provision under consideration, is ill advised, and in many instances, impracticable ; but he, nevertheless, claims for his client, as he is justified in

doing, the benefit of its enactment. I may agree with both learned counsel that the provision in question in this Act is unnecessary and introductive of a cumbrous machinery for the performance of one of the necessary affairs of life, and that the application of these new technicalities may, in many instances, and even in the present one, occasion injustice; but all such considerations must be disregarded by the judge, whose province it is to declare, not to make, still less to break—law. For the consequences of that enactment he is irresponsible because he is powerless to avert them, however much he might desire to do so.

It was ingeniously argued by the counsel supporting the will, that the deceased was not what the Act contemplated by the term "marksman," being not an illiterate man, but one who once could write, and was only incapacitated by recent blindness from writing his name to his will; that his name should therefore be considered as having been signed through the agency of Page, whom he desired to write his name, and the will well executed under the earlier words of the section. But I cannot accept that reading, which would have carried great force if the section had stopped there. The broad fact is patent that the will was "made by a marksman," and was not first read over to or by him in the presence of two witnesses who attested it as such witnesses. The Act makes no exception in the case of a blind man, and it were strange if it did, for of all marksmen he is the most helpless and most needing protection.

I have considered the doctrine in *Ellis v. Smith*, 1 Ves., J.H., in *Smith v. Candron*, in *Wright v. the Trustees of the British Museum*, and in other cases determined upon wills made pursuant to the 5th sec. of the statute of frauds, in which the courts allowed certain things which were equivalent to those prescribed by the statute to satisfy the statute, such as an acknowledgment of his signature by a testator in the presence of three witnesses, to be equivalent to making his signature in their presence, and I own that I meditated upon that doctrine with a hope that it would justify me in upholding the will in this case; but the language of the statute of frauds is not clearly so unequivocal as that of the statute now under my consideration. In those cases there was no such violence done to the language of the Act as would be done if I applied the doctrine of equivalents to this, and I bow to the doctrine of Lord Hardwicke "where things are expressly required by statute, courts should not say

that other things are equivalent." My judgment compels me to say that the stringency of this enactment leaves me no alternative, and I decide that the paper writing propounded in this case as the will of William Menchinton is not valid for want of due execution, and I order that it be not admitted to probate. The decision I have now given is the first that has occurred under this clause of the new Wills' Act.

The amount involved is large—the merits and justice are all in favor of those who support the will, and against whom I have reluctantly given judgment; and I am comforted by knowing that if they think they have reasonable grounds to expect any benefit from the Supreme Court the law affords them the opportunity of appealing to that tribunal.

I make no order at the present time on this subject of administration, because Mr. Pinsent openly stated that he held a will of William Menchinton executed with all the formalities then required before that which has been the subject of this litigation

Any such must be propounded for probate promptly, as I shall not allow the estate to remain unrepresented much longer. I reserve the question of costs for further consideration. The leaning of my mind at present is to allow the executors named in this informal will all their costs, and to refuse any costs out of this estate to the opponents; but I don't see that at present there is any legal representative on whom I could make such order, and therefore I reserve the whole question of costs.

*Mr. Whitway, Q. C., and Mr. Pinsent, Q. C., for executors.*

*Mr. J. I. Little for next of kin.*

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164 IN RE INSOLVENT ESTATE OF NICHOLAS MUDGE  
AND MUDGE & CO.

1866, *January*, HON. MR. JUSTICE ROBINSON.

*Insolvency—Mortgage—Notice of Insolvency.*

A mortgage given fourteen days before a declaration of insolvency to secure a pre-existing debt is valid when the mortgagee was not aware and had no notice of the insolvent condition of the mortgagor.

EXCEPTIONS were filed to the master's report affirming the validity of a mortgage made by the insolvents to Henry K. Dickinson fourteen days before the declaration of their insolvency to secure a pre-existing debt due by them to Dickinson; and the question raised was whether, under all the circumstances and facts in evidence, we could arrive at the conclusion that at the time of the execution of the mortgage Dickinson "had notice or was aware" of the fact of their insolvency. We have had some difficulty in arriving at a clear and satisfactory conclusion upon the facts in evidence. At common law the mortgage would have been unquestionable, and the Act depriving a party of his security, although an excellent provision in regard to the general interests of commerce, is, nevertheless, of a penal character and to be construed strictly.

Notice was out of the question, as none has been given, and the evidence to fix Dickinson with "being aware" of the insolvent circumstances of Mudge & Co. was wholly circumstantial and not conclusive; whilst Mudge, jr., himself, swore that when he gave Dickinson the mortgage he did not inform him of his circumstances; and Dickinson swore positively that he did not know and did not believe they were insolvent; that he had seen their balance sheet of the preceding year, which exhibited a favorable condition of effects; and that at the time of the mortgage the trade generally would have given credit to Messrs. Mudge. Mr. Dickinson further stated that the grant of the mortgage was only the performance of a former undertaken, when he made advances to them.

We are, therefore, of opinion that there is not sufficient evidence to satisfy us that Dickinson "was aware," in the legal meaning of the word, of the insolvent condition of the Mudges, and, therefore, that his mortgage is valid. The master's report must be confirmed, but without costs against the estate.

*Mr. Pinsent, Q. C., and Mr. Hayward* for trustees.

*The Attorney General* for mortgagees.

1866, *January*. HON. MR. JUSTICE ROBINSON.

*Costs—Revision—Costs of service of writ—Plaintiff's travelling expenses.*

The Court will not disturb the taxation of the master, unless it clearly appears that a mistake has been made by him.

MR. PINSENT, Q. C., for defendant, moves for revision of master's taxation, and Mr. Hogsett, for plaintiff, also moves that the master's taxation, striking out \$6.95, as travelling expenses to serve writ, be revised.

Master is expected and required to decide every matter before him to the best of his judgment as if there were no appeal, and on that ground court is slow to alter his taxation except it appear clearly that a mistake is made by him.

Without determining that the fee allowed to the plaintiff as mileage for services of process is or is not payable to anyone else who may serve the process, I am perfectly satisfied that the master in this case exercised a sound discretion in disallowing the charge made by the plaintiff of \$6.95, looking at the affidavit of service on the back of the writ by the bailiff who did effect the service, wherein he swears that he necessarily travelled — miles to make such service.

As regard the allowance made to the plaintiffs for the travelling expense of themselves and of one other witness to and from St. John's and conduct money and board for six days here, I do not see anything to impugn the judgment of the master. The plaintiff was bound to be ready for trial on the 30th November, being five days after the service of writ; and, residing upwards of fifty miles from St. John's, it was reasonable that they and their witness would be in St. John's, and it is shewn that they were there. On the 1st December a rule to transfer to Northern Circuit Court was obtained by defendant, not contending any stay of proceeding, and that rule was not made absolute, nor was it discharged during that term. It would be altogether unreasonable to expect the plaintiff to assume that such a motion would have been made, or being made, that the court would make the rule absolute, and they were, therefore, justified in remaining a reasonable time to await the probable result. They swear that they waited six days; no affidavit to the contrary or that that period was unreasonably long is filed. The master allowed the ordinary charge for those six days, and I think he did right. I much approve of attornies carefully watching the taxation of costs against their clients, and in this

case I do not feel justified in making any order for revision, and I make no order for allowance of the costs of this motion.

*Mr. Pinsent, Q. C., for plaintiff.*

*Mr. Hogsett for defendant.*

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IN RE FOLEY'S INSOLVENCY.

1866, *January.* HON. SIR H. HOYLES, C. J.

*Insolvency—Trustee in—Erroneous payment by—Liability of.*

Where the trustee in insolvency paid a claim believing it was preferential, and it appeared from the schedule sworn to in Court that it was, the Court refused to make an order holding the trustee liable in his own estate for such error.

MR. HOGSETT, for certain creditors, excepted to the master's report.

Mr. Kough took also an exception to it, and moved that the trustee be uncharged with an amount erroneously paid by him to a creditor whose claim be regarded as preferential.

Mr. Emerson, for the trustee (Dr. Moran), opposed the motion, and contended that, although the trustee had exceeded his authority in making this payment, the circumstances of the case were such that the court would not order him to pay the money out of his own pocket. The trustee was not acquainted with the requirements of the law and had had no means of taking professional advice. He had been guided by the schedule of the insolvent's debts, as sworn to the court, and among which this particular claim appeared as preferential.

The court confirmed the master's report, but refused to uncharge the trustee with the amount irregularly paid. Estate ordered to be distributed.

*Mr. Hogsett and Mr. Kough for certain creditors.*

*Mr. P. Emerson for trustee.*

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1866, *January*. BY THE COURT.

*Criminal Law—Practice—Indictment for murder—Right of prisoner to have whole panel of jurors in Court.*

On an indictment for wilful murder, the accused is entitled to have forty-eight jurors summoned for his trial. He has no right to have the whole panel present when the jury to try him are being called. If the panel be exhausted the Crown may proceed to a *tales* or the issue of a special precept.

THIS case, in which the prisoners stand charged with the wilful murder of Patrick Whelan, was brought before the Supreme Court yesterday morning. The unfortunate occurrence took place at Bay-de-Verde on the 15th July last, and was the result of an altercation between Patrick McCarthy and the deceased. From the charge of his lordship the Chief Justice, we find that—

“The deceased and the accused were residents of Bay-de-Verde, in Conception Bay, and between 8 and 9 o'clock on the evening of Sunday, the 15th of July last, the deceased, and his brother Thomas Whelan, the principal witness for the prosecution, called at the house of the McCarthys, with whom they were then on friendly terms.

After remaining there for a short time, a trifling altercation arose between Patrick McCarthy and the deceased, whereupon the Whelans left for their own house, which was but a short distance from that of the McCarthys. On the road thither Thos. Whelan was suddenly knocked down by a blow from behind, and on recovering himself and looking round, he saw his brother engaged in a scuffle with John McCarthy, and while these parties were thus engaged, and, as would appear, before Thos. Whelan could interfere, Patrick McCarthy approached the deceased, and with some weapon struck him a violent blow on the back of the head, which felled him to the ground, and from the effects of which he lay there insensible. An alarm being raised, the McCarthys retreated to their own house, and help being obtained, the deceased was carried to his house, where, after lingering for a week, he died from the effects of this blow.”

The two men were brought into court shortly after eleven o'clock yesterday morning, and placed in the dock. The indictment having been read over, and the usual question being put to the prisoners, they both pleaded “not guilty,” whereupon, two jury panels having been summoned, and 37 jurymen having answered to their names—

Mr. Hogsett, with whom was Mr. Little, for the defence, objected to proceeding with the case, on the ground that the jury panels were incomplete. The learned gentleman contended that he was entitled to full panels of 48 jurors, from which to challenge at discretion. He contended that in so serious a trial as one involving the life or death of his clients, he was entitled to all the appliances which the law afforded him.

The hon. Attorney General, with whom was the hon. Solicitor General, for the Crown, contended that the proceedings were quite in order, and according to precedent and custom. If sufficient jurymen were not present, the deficiency could be made up by the issue of an additional precept, or a *tales*—the latter course having been adopted in the Queen v Manning in 1864.

The court finally ruled, taking note, however, of Mr. Hogsett's objections, that there was no irregularity whatever in the matter. Defendants had no right to 48 jurymen, they had a right that 48 should be summoned, and the law presumed that that number was actually present; if not, they might proceed to a *tales*, or the issue of a special precept. As that contingency had not yet been reached, there was nothing to be done in the meantime, but to proceed to call the jury.

The Clerk of the Court then proceeded to call over the names of the jury, each man called, being present, and unchallenged, taking his seat in the jury box, and being sworn. The following jurymen were accordingly selected unchallenged:

Richard Funnell, Michael Fitzgerald, Richard Walsh, John Fardy, Lawrence Ryan, Thomas Ryan, Andrew Keefe, William Kennedy.

Here some 28 jurors having been challenged by the defence, and the panel having been exhausted, a precept was issued, returnable instant, to make up the deficiency.

The court then adjourned whilst the jury were being summoned, and at four o'clock the following additional jurymen completed the number: Francis Gynon, Charles Shaw, John Collins, and Joseph Morrissey.

The Attorney General then opened the case to the jury, stating the circumstances and particulars of the charge; after which the first witness, Thomas Whelan, brother of the deceased, was called, his examination having occupied about four hours and a half.

*Attorney General and Solicitor General for the Crown.*

*Mr. Hogsett for prisoners.*

CHAS. O'DONNELL v. CORNELIUS O'DONNELL, 169  
JOHN O'DWYER AND HANNAH, HIS WIFE,  
ADM. OF JOHN O'DONNELL.

1867, *January*. HON. MR. JUSTICE ROBINSON.

*Partnership—No agreement—What constitutes a partnership—Evidence necessary to establish a partnership.*

For a great number of years Cornelius O'Donnell and his sister, Hannah, wife of John O'Dwyer, resided with their brother, John O'Donnell, deceased, and assisted in the carrying on of a wine and grocery business. The license was in John's name, as was also the lease of the premises in which the business was carried on. There was no agreement for a partnership written or verbal. Never any settlement of accounts or division of profits. All the parties lived together, worked for the general support, and, as alleged, contributed money towards the general sustentation of the business. Accounts were produced in evidence for articles had from merchants in the names of all the parties said to be for the general business. John O'Donnell died intestate, and his brother Charles claimed a share in all his property, whilst Cornelius and Hannah claimed two-thirds of the estate belonged to them as partners of deceased.

*Held*—No partnership existed. A partnership cannot be established by the evidence of the partners and their private communications, the fact must be proved *aliunde*.

THIS case was tersely and judiciously argued last term by Mr. Kent on behalf of the complainant, and by Mr. Joseph J. Little on behalf of defendants. The determination of it has occasioned my brother Judge Emerson and myself some difficulty owing to the insufficiency and quality of the evidence.

The sole question at issue is whether a co-partnership did or did not exist between the deceased John O'Donnell and his brother and sister, the defendants, Cornelius and Hannah.

The deceased died intestate, and the plaintiff, who is his brother, relying upon his legal rights, claims a share in all the property of which deceased died possessed, and which, he contends, belonged solely to him; whilst the defendants contend that two thirds of that property belonged to them, as having been partners with him during several years preceding and up to his death, and that only one-third is divisible amongst complainant and the other next of kin.

The only evidence adduced by the defendants to support their position is given by themselves, who say that there was no agreement written or verbal for or about a partnership; that there never had been any settlement of accounts or division of profits; that the lease of the house in which they all lived was in the name of John alone. The licenses were always in his name, and money lodged in the Savings' Bank, the pro-

duce of the business, was in John's name alone; but they rely for establishing a partnership upon the fact that they all lived together and worked each in his and her own way for their general support, and each contributed money towards the sustentation of the establishment, which was a grocery and spirit shop. Numerous accounts from merchants for articles said to have been had for the establishment were put in evidence, some in John's name, some in Hannah's name and some in Cornelius's name.

The burthen of proof to establish the affirmative issue raised by the defendant lies upon them, and the danger of allowing a co-partnership to be established between the deceased and the survivors by the unsupported testimony of the survivors themselves is apparent, and was recognised by the Lord Chancellor in *ex parte Bedford*, 5 Ves., 424, the substance of whose decision is summed up in the marginal note thus: "A partnership cannot be established by the evidence of the partners and their private communications, the fact must be proved *aliunde*" This authority has been strongly supported by a very recent decision, cited by Mr. Kent,—*Radcliffe & Rushworth*, 33 Beav., 484.

The evidence of Mr. Kickham, a near relative of the parties, and a witness called by the complainant, affirms that although he had been on intimate terms with the family, he never heard of the existence of a partnership amongst them. He does, however, confirm the testimony given by the defendants in one particular, that the industry and good management of Hannah largely contributed to the accumulation of the property, and I should have been glad if she could, by our judgment, enjoy more fully the benefit of her industry, especially against the plaintiff, who lived in a foreign country and had no hand whatever in earning the money; however, she should and could have protected her own interests if they really were such as she now represents them to have been. The law is to be administered by reference to general principles and fixed rules, and there would be no certainty or safety if they were to be superseded by the discretion of the judge who should happen to hear the case.

Adhering to the general rule, we must decide that no co-partnership has been sufficiently proved to have existed between the deceased, John, and his brother and sister, Cornelius and Hannah, and there must be a reference to the master to take an account of the assets of the deceased on the basis of such

assets being his sole property. And let the cause be reserved or further directions upon the master's report.

*Mr. Kent* for plaintiff.

*Mr. J. I. Little* for defendants.

AMBROSE SHEA v. NARCISSE PORTULANCE ET AL.

1867, *March*. HON. SIR H. HOYLES, C. J.

*Practice—New trial—Contract—Shipping—Damages—Verdict—Rule nisi—Improper admission of evidence—Misdirection—Excessive damages.*

The rule on which a new trial should not be granted on the grounds that secondary evidence was permitted to be given of the contents of a written document, no sufficient notice to produce the document having been given, is, where it is clear beyond a doubt that the objectionable evidence did not weigh with the jury in forming their opinion.

THIS was an action brought to recover damages for loss on the sale of a quantity of flour occasioned to the plaintiff by the alleged wrongful deviation of the defendant's vessel while engaged in carrying the flour from Montreal to St. John's.

The principal facts of the case are as follows:—

About the beginning of May, 1865, the plaintiff's agent at Montreal shipped on board the defendant's vessel, the *Alvina*, 1,000 barrels of flour to be conveyed thence under a bill of lading in the usual form to St. John's, to be there delivered to the plaintiff. The *Alvina* (of which the defendant, Narcisse Portulance, was master until her final departure from Quebec), sailed from Montreal with the flour on the 4th of May, and on her way down the river to Quebec, put in at a place called Grand Isle, where, it appeared, the master had his home, and remained there three or four days, arriving at Quebec on the 13th of May, Saturday. She sailed again from Quebec on Monday the 15th, and arrived in St. John's on the 4th of June, when flour, which up to the last of May had maintained a higher price, had fallen to 28s. 6d. per barrel.

At the trial of the cause, which did not take place until last December term, the plaintiff contended that the *Alvina's* putting into Grand Isle and Quebec was a wrongful deviation on the part of the master, which lengthened the voyage several

days and brought her cargo to a falling market, thus occasioning a loss of three shillings per barrel on the flour.

The defendants, on the other hand, contended that the deviation in both instances was not wrongful but necessary; that the *Alvina* was compelled by the dangers of the navigation in that locality, the lateness of the day, and the state of the wind on her arrival at Grand Isle, to put in there, and that she departed as soon as wind and weather permitted; and that the delay at Quebec was occasioned by the necessity of procuring another master in the room of the defendant, Narcisse Portulance, who had fallen sick on the voyage from Montreal, and by the obligation resting on the defendants to have the change of masters recorded at the Custom House of the former port.

Much evidence was adduced by both parties in support of their respective positions.

The court directed the jury that the master of a vessel was bound to proceed to his destination by the direct route and without unnecessary delay, and that if he wrongfully deviated or delayed his owners would be liable to make good to the owners of the cargo any loss they might sustain which naturally flowed from this breach of contract, and which might be presumed to be in the contemplation of both parties as the natural consequence of such breach at the time of the contract being entered into; and that in this case, if they found for the plaintiff on the question of a wrongful deviation and of consequent loss on the sale of the flour, the measure of damages would be the difference in the market value of the goods at the time of their arrival and the value when they would have arrived had there been deviation.

The jury found a verdict for the plaintiff for \$500, thus estimating the loss at fifty cents on every barrel of flour.

A rule *nisi* for a non-suit or new trial, on several grounds, obtained by the defendant, was argued in last February term, and, after much consideration, we have now to deliver judgment upon the points in controversy.

The first objection relied on by the defendant is the improper admission of evidence—

First—In the introduction of an extract from the books of the Trinity House of Quebec, stating that the *Alvina* had left Quebec on the 16th of May; and

Secondly—In permitting secondary evidence to be given of the contents of her register, no sufficient notice having been given to produce the document itself.

As to whether the extract in question was in strictness admissible in evidence, regard being had to the appearance of the extract and to the preliminary proof always necessary to render such a paper admissible, we give at present no opinion, because we all think that taking into account the preponderating evidence of the *Alvina's* having left on the 15th, and the fact that the apparent contradiction between the extract and the testimony of the witnesses for the defendant may be reconciled by the supposition that the former referred to nautical and the latter to shore time, the entry became under the rule presently mentioned not of that weight that its admission, if improper, should occasion the loss of the verdict.

The evidence of the contents of the register, which was pressed in by the plaintiff contrary to the expressed opinion of the court at the trial, was clearly inadmissible, and but for the peculiar circumstances of this case must have occasioned a second trial as a matter of right, but when we find that the evidence of another witness read for the plaintiff deposed positively to the ownership of the *Alvina* being in the defendants, that the question of ownership neither was nor could have been made a point of defence, since the defendant, Narcisse Portulance, and not fewer than six of his own witnesses, deposed to the same effect as the witness referred to for the plaintiff; and that the second jury, without the objectionable evidence, arrived at the same conclusion upon this point as the first, we feel that the strict rule which should govern our decision upon this objection, namely, that a new trial will not be granted where it is clear beyond a doubt that the objectionable evidence did not weigh with the jury in forming their opinion (see *Lush's Practice*, 631-2, and the cases there cited) has been satisfied, and that to set aside the present verdict merely for the purpose of having a third finding upon the point which must be determined as it has been already found, would be to pervert a rule of law to the needless continuance of litigation and expense.

The second ground of the defendants rule is the alleged improper reception of evidence and a misdirection as to the liability of the defendants for the fall in the market price of the flour.

The evidence here referred to was of certain sales of flour made in St. John's about the time of the *Alvina's* arrival; but under the circumstances in which it was received we can see nothing objectionable in the character of this evidence as it

tended inferentially to establish one of the points in issue, the then market value of the flour, and was, therefore, perfectly relevant without being otherwise open to exception.

Nor do we see any valid grounds of objection in the direction given to the jury upon this head, the same rule as to the measure of damages being applied in this case which governed the courts at Westminster in the cases of *Hadley & Roxendale, v. Exche.*; *O'Hanlan vs. The Gt. West. Ry. Co.*, 34 L. J. 154; and in other cases cited at the trial and on the argument of the rule *nisi*, and regarded as leading cases upon this subject.

It was indeed contended by Mr. Pinsent that the present case did not fall within the principle laid down in *Hadley and Roxendale*, as the defendants could not have had in their contemplation at the time of making the contract the causes which occasioned the decline of the market price in St. John's; but we are of opinion that there is no authority for the distinction here taken, and that it is sufficient if the defendants can be reasonably assumed to have had in contemplation a fall in the market as the possible result of a breach of contract on their part, although they may have been wholly ignorant of the precise causes to which such fall might ordinarily be attributable.

It was further objected as a ground of mis-direction that it was not left to the jury to say whether the broker Charlebbi was not the agent of both parties in effecting the chartering of the *Alvina*; but we are of opinion that the evidence clearly established this witness to be the agent of the defendant only, and that at least in this case in the way in which this point was put to the jury the plaintiff and not the defendants was the party who had ground of complaint (if any existed) in this particular.

A third point taken by the defendants is, that the verdict is contrary to the weight of evidence; and if only one trial had been had upon the facts of this case this objection would certainly have been entitled to great weight, at least in the estimation of some of the judges, but as there has been a second trial upon substantially the same evidence, in which a second special jury arrived at the same conclusion as did the first, the object of the second trial has been in effect obtained, and there is no ground for directing a third trial upon questions upon which so much proof was given on both sides, and where such proof was so evenly balanced that verdict either way could be upheld.

The last point for our consideration in this case is, the question of excessive damages; a point which we have carefully

considered with the view, if possible, of partially relieving the defendant from the weight of a verdict which we feel to be extreme, particularly when contrasted with the moderate finding of the jury in the second case. But we cannot overlook the fact that no evidence as to market value was offered by the defendant in the present case, and that the only evidence received does certainly sustain in some respects the conclusion at which the jury arrived, and under such circumstances the rule of law applicable to this part of the case (*sec Lush's Practice*, p. 635) will not justify our setting aside the verdict merely because we do not altogether coincide with them in a question purely of fact.

The rule *nisi* must be discharged, but (as it was fully justified by the admission in evidence of the contents of the certificate of registry) without costs.

## M. P. RYAN v. NARCISSE PORTULANCE.

1867, *January*. HON. SIR H. W. HOYLES, C. J.

### *Practice—New trial—Misdirection—Rule nisi.*

The refraining of the judge from laying before the jury certain legal principles which, under ordinary circumstances a jury could not fail to recognise themselves even though not reminded, is not a misdirection, and consequently no ground to set aside a verdict.

IN this cause the facts in evidence, the question in issue on the trial, and the objections raised by a rule *nisi* for a new trial or non-suit, were similar to those in the case of *Shea and Portulance*, with the exceptions that evidence of the contents of the certificate of registry was not introduced by the plaintiff in the present case, and that a further objection to the directions given to the jury, to the effect that they should have been told that the master of the *Alvina* was not bound to incur unnecessary risks in the prosecution of the voyage was raised by the rule *nisi*.

Upon this exception we are of opinion there was no misdirection. The principal here contended for was one which, under ordinary circumstances, a jury could not fail to recognize without being reminded of it, and was impliedly assumed by both parties in their contention as to the wrongful or justifiable

character of the detention of the *Alvina* at Grand Isle; the defendants maintaining that the danger of passing that place when the *Alvina* arrived there justified the master in putting in, while the plaintiff contended (not denying that such danger, if real, would have justified the deviation) that the master went in wrongfully and in pursuance of an intention formed by him before leaving Montreal.

The rule in this case must also be discharged, but we give no direction as to costs.

CADWELL v. WARREN, CH. BOARD OF WORKS.

1867, *January*. HON. MR. JUSTICE ROBINSON.

*Highway—Negligence—Board of Works, duties of—Streets, repairs of—Injury to person—Liability*

Where the declaration stated "that the defendant (the Chairman of the Board of Works) in repairing, extending, and widening Gower street, had negligently left or caused to be left a certain stick in or upon the said highway, or abutting upon the same, whereby, &c , &c.

*Held*—That the declaration was bad for not showing any facts creating a duty upon the defendant, or averring that defendant had any knowledge or notice of the existence of the stump, or the possession or control over any funds to enable him to remove it.

FROM the evidence in this case, it appeared that on a dark night in October, 1864, the plaintiff who is a nursetender advanced in years, fell over the stump of an old fence post which had remained on the side of Gower street since 1859, whereby she broke her leg and has since been lamed for life; a fire had consumed the fence in that year, and a new fence had been erected a few feet further back than the old one, leaving this stump outside; the old and the new fence were private property.

The contention of the plaintiff was that the public street had thus been widened, that the *locus in quo* had legally become a portion of Gower street, and therefore had come under the charge of the Board of Works, pursuant to 18 and 19 Vic. c. —; and that the omission of the defendant, as Chairman of the Board of Works, in 1864, to remove that stump by whomsoever left there, constituted such culpable negligence as rendered him responsible in damages for the injury she sustained.

The declaration simply charged the defendant "that in repairing, extending and widening" Gower street, "he had negligently left, or caused to be left, a certain stick in or upon the said highway or abutting upon the same, "whereby, &c., &c." The declaration did not set forth on its face any facts creating a duty upon defendant, or aver that the defendant had any knowledge or notice of the existence of this stump, or had the possession of or control over any funds to enable him to remove it, neither was it alleged or proved that the *locus* had ever been placed under the care of the defendant or of the Board of Works, or had been assumed by him or them—or that the defendant or the Board had "repaired, extended, or widened," or performed work of any description whatever upon this part of Gower street.

The defendant had originally been sued in his private capacity, but on the trial the plaintiff asked and obtained leave to amend the declaration by adding after his name the words, "being Chairman of the Board of Works when the cause of action arose," which amendment the defendant resisted.

At the close of the plaintiff's case, Mr. Whiteway called for a non-suit upon the grounds hereinafter more particularly noticed, and leave was reserved to him to move but the case was not stopped; having addressed the jury he called as a witness the defendant, who proved affirmatively that the *locus in quo* had not been placed under the charge of him or of the Board of Works—that no work of any kind had been done upon it either by the Board or by him, that he had no notice or knowledge of the existence of the alleged nuisance until after the accident had occurred, and that no funds were placed at his disposal or that of the Board to enable him to remove the stump.

The jury found a verdict for the plaintiff, and assessed her damages at \$550.

A rule *nisi* in the following terms was obtained :

It is ordered, that the verdict in this cause be set aside and a non-suit entered or a new trial granted, upon the following grounds :

First—That the amendment of the declaration was improperly allowed at the trial.

Secondly—Improper admission of evidence.

Thirdly—That the verdict was contrary to evidence.

Fourthly—That the damages are excessive.

Fifthly—That the defendant, Warren, was not Chairman of the Board of Works when action brought and amendment made in declaration.

Sixthly—That there was no such negligence or breach of duty of the defendant, Warren, as to render him liable in this action.

Seventhly—That if defendant, Warren, was liable it could only be jointly with the other members of the Board of Works.

Unless cause to the contrary be shewn in four days."

This rule has been well argued by Messrs. Pinsent, Q.C., and Prescott Emerson on behalf of the plaintiff, and by the Attorney General and Mr. Whiteway, Q.C., on behalf of the defendant, and I will dispose of the points raised seriatim.

First—We all think that the amendment of the declaration was properly allowed, that the defendant knew perfectly well what the plaintiff's case was, and that he was not taken by surprise or unduly prejudiced by the amendment.

Second—We are of opinion that there was not any evidence improperly received, the evidence objected to was the record of the proceedings by the Board of Works upon the plaintiff's claim to them for compensation, at all which proceedings the defendant was present taking part, and therefore the evidence was received against him.

Third—We think the verdict was contrary to evidence, because in our opinion the variance between the declaration and proof was fatal; the cause of action upon which the plaintiff relied was defined and circumscribed; he stated that the defendant in *repairing, extending, or widening Gower street*, neglected to remove the alleged nuisance; these words describe and limit the charge, and cannot be rejected as surplusage; but must be proved.—*1 St. or Ev. 376-383; Mayor and Humphries, 1 C. & S. 252*. They were, however, not only not proved but were distinctly disproved.

Fourth—The amount of the verdict does not affect our decision, and I shall refer to it hereafter.

Fifth—We think there is no force in this objection. If the defendant was liable when the cause of action arose, he would not be absolved from his liability by afterwards ceasing to be Chairman of the Board of Works.

Sixth—This is the substantial ground of our judgment, upon which we all fully concur.

It must be borne in mind that there is a broad distinction between acts of commission or malfeasance, and acts of omission or nonfeasance. As a rule, everyone is responsible for the damage he occasions by negligently *doing* something, but here the defendant is charged merely with a nonfeasance, with having omitted to remove a nuisance from a public street which he had not put there. Now, penalty presupposes responsibility, and as the defendant is under no common law liability to remove such a nuisance, all the facts necessary to shew a legal obligation upon him to perform that which he is blamed for neglecting must be stated in the declaration and must be proved in evidence.—*Brown v. Mallett*, 5 C. B., 616; *Seymour v. Maddox*, 162 B., 331; *Curlewis v. Broad*, 31 L.G.; *Addison on Wrongs*.

In the authorities cited at the bar and in several others which I have consulted, where public bodies or official personages were held responsible for mere nonfeasance in neglecting to remove an obstruction upon a highway by land or water, it was not only averred in pleading but proved in evidence that it was their duty to remove it, that they had notice or knowledge, or the means of knowledge of its existence; and that they had, or were empowered to raise, the necessary funds to enable them to abate the nuisance.—*Metcalf v. Hetherington*, 11 Ex R.; *Gibbs v. Mersey*, D. Co. 3, H. & N.; *Penhallow v. Mersey*, D. C. 7, H. & N.; *Hartnall v. Ryde*, C. 2, B. & S. In every one of these particulars, the case of the present plaintiff is deficient, and therefore in the words of the rule we hold that “no negligence or breach of duty” has been legally established against the defendant.

It may help to remove a misapprehension which seems to exist respecting the position and responsibilities of the Board of Works, and of the chairman thereof, if I observe that, although the public streets are by 18 & 19 Vic., placed under the “*superintendence and management*” of the Board, and the chairman has “the *supervision*” of them, (and even that is subject to the control of the Board); to neither of them is public money voted, the grants are always made by the Legislature to Her Majesty, and are payable only by the warrant of the Governor for such special services as are expressly directed by the Legislature.

Seventh—Upon this point it is not necessary to give judgment, but I incline to the opinion that the law is with the defendant; this, however, is my own, for my brother judges differ from me in opinion.

I acquiesce in the doctrine that in cases of malfeasance, or even of nonfeasance under a common law liability, all the wrong-doers need not be joined, but it appears to me unreasonable to sue an individual for neglecting an act, the obligation to perform which neither common law nor statute imposes upon him individually; supposing the Board of Works had been empowered by statute to abate this alleged nuisance, they alone who had the power would be responsible for culpable omission to exercise it, it might so happen that the very party sued, if one was selected, was desirous to perform the act and was disabled by the overruling vote of the board; it may be said that he could defend himself by adducing evidence of what he said at the board, but it is by no means clear that a defendant can give in evidence on his own behalf what he said behind the back of the plaintiff, and, moreover, it is a principle of law that no man shall be called upon to justify his conduct until a legal *prima facie* case shall have been made out against him.

In the analogous case of corporations it has been ruled "that an action cannot be maintained against individuals for acts erroneously done by them in a corporate capacity to the injury of plaintiff, unless there be good ground to impute malice."—*Harman vs. Tuppendor, 1 East, 555.*

We feel that the situation of this poor woman is one of hardship, and appeals strongly to our sympathies, but the Judicial Committee has, through the mouth of Lord Campbell in *Paul vs. E. I. C., 1 E. C. Lo. E. R.*, laid down the rule by which we must be guided: "It is the duty of all courts of justice to take care for the general good of the community that hard cases do not make bad law"; and we are unanimous in opinion that the rule for a non-suit must be made absolute; had no motion for non-suit been made, *Seymour vs. Maddox, 16 Q. B.*, is an authority to shew that judgment would have been arrested for the insufficiency of this declaration.

The question respecting the amount of damages being or not being excessive becomes immaterial in disposing of this rule, but it may tend to some equitable adjustment of the plaintiff's claim out of court if we state our opinion upon the point. I do not say how far the court would be disposed to interfere with the verdict of a jury which awarded heavy damages against a public functionary who had acted with gross negligence or in an arbitrary and oppressive manner, but having regard to the circumstances of the present case, where nothing

of that description is imputable to the defendant, we are of opinion that the damages awarded by the jury were excessive.

Having disposed of the law of this case we think it right—in accordance with the practice not unfrequent in the courts at home—to offer a suggestion for the consideration of all concerned. Whether facts could or could not be adduced to enable the plaintiff to sustain an action against some person or body, we are not prepared to say, but of this fact we think there can be no question, viz., that Mrs. Cadwell has sustained a serious injury without any fault on her part.

One of the jurors stated publicly at the trial, and the same statement has been repeated at the bar, that public funds were appropriated several years ago in paying the owner for the land whereupon the stump lay, whereby it became public property. Now, these statements were not in proof and do not affect our judgment, and, moreover, the Attorney General informs us that he is not aware of the fact, and can find no evidence of it in the official records. Nevertheless, Mr. Stuart, the Secretary of the Board of Works, testified that the spot where the stump lay appeared to be upon the public highway and to have been dedicated to the use of the public, and it would be satisfactory to the court if some reasonable compensation were made to this plaintiff without the intervention of another trial.

*Mr. Pinsent, Q. C., and Mr. P. Emerson for plaintiff.*

*The Attorney General and Mr. Whiteway, Q. C., for defendant.*

## GREENE v. LEAMAN.

1867, January. HON. MR JUSTICE ROBINSON.

*Agency—Government agent, personal liability of—Notice to in action against—Contract—Breach—Damages—Verdict—Rule nisi—New trial.*

An action cannot be maintained against an agent of the Government who has entered into contracts, by those who have supplied the agent goods. An individual contracting in his official capacity or as the agent of the Government is not personally liable on the contract so entered into. Such a rule arises from motives of public policy, for no prudent person would accept a public position at the hazard of exposing himself to a multiplicity of private suits.

THIS was an action brought by the plaintiff against the defendant to recover damages for breach of contract on the part

of the defendant, as "Chairman of the Road Board of Brigus," in not permitting him to supply the said board with provisions, and also for the value of provisions supplied to the board. The case was tried by me before a Special Jury at Harbor Grace last month, when the special verdict hereinafter mentioned was found, subject to leave reserved to the defendant to enter a non-suit upon one or all of the grounds following:—

1st—That the defendant was entitled to receive notice of action pursuant to the provisions of the Road Act, and none was given.

2nd—That there was not sufficient evidence of a valid written agreement, inasmuch as that relied upon by the plaintiff was found, when produced by the defendant, not to have been signed by him, although he wrote it, retained it, and acted upon it.

3rd—Because there was a non-joinder, the other members of the Brigus Road Board not having been sued with the defendant.

4th—Because the action was not maintainable against the defendant for the breach of a contract in which he was acting as a public officer and avowedly as the agent of Government.

I submitted to the jury categorically the various questions that arose on the pleadings, and they have found their verdict thereupon as follows:—

Questions for the jury—

First—Has the written contract alleged in the declaration been proved? *Yes*

Second—If yea, was that contract broken by defendant without any justifiable cause? *Yes*.

If yea, what damage has the plaintiff sustained by reason of such breach? *Three pounds currency.*

Third—If defendant did commit such breach, did he, in so breaking it, act in good faith and to the best of an honest judgment as a public functionary and for the public good? *Yes*.

Or, did he so break it in bad faith and with a corrupt view to injure the plaintiff or benefit himself, inaking his position as chairman merely a pretext to cover such conduct? *No. No evidence of this whatever.*

Fourth—Did the plaintiff supply any goods by the order of defendant which are unpaid for? *Yes*

If yea, to what amount? *£194 12s 10d.*

And were such goods supplied by plaintiff on the *personal credit* of the defendant? *No.*

Or, on the credit of the Government, or the Board of Road Commissioners? *On Government, through the Board of Road Commissioners.*

For self and fellow jurors,

JOHN RORKE.

The plaintiff obtained a rule *nisi* returnable before this court for leave to enter up final judgment for £197 12s. 10d., pursuant to the said verdict; whilst the defendant obtained a cross rule *nisi* to enter a non-suit, pursuant to the leave reserved.

The rules have been well argued, but nothing which has been urged has shaken the opinion I had formed at the trial, and in the correctness of which both my learned brothers concur.

When granting these rules I suggested to the plaintiff and defendant that it might prove a just and satisfactory termination of the suit if the defendant should at once pay to the plaintiff the £194 12s. 6d. due to the latter by the Government, and which the Solicitor General admitted they were always ready to pay on proper demand, together with the £3—found as damages for breach of the contract, and that each party should pay his own costs, because each had been to a certain extent in the wrong; we all regret that such a suggestion was not adopted, for it would have satisfied the justice of this case more completely than will the strict rule of law which we must now apply.

As the defendant's rule will dispose of the case, I will consider it first, and will determine each ground relied on for a non-suit in the order in which it was taken.

1st—I think defendant was not entitled to receive notice of action, because he was not acting as a Road Commissioner under the Act, or in the disposal of money voted for the purposes of that Act; but that he, together with the other members of the Road Board, were merely employed by the Government as an existing machinery convenient to dispense pauper relief, getting something in the nature of a public return for the public money thus expended by them.

2nd—I think there was abundant evidence of the written agreement declared upon, and that the requirements of the Statute of Frauds concerning it were satisfied, not only by the delivery to and acceptance by the defendant of a large portion of the goods, the subject of it, but by the written recognition and ratification of it contained in the defendant's letter to the

plaintiff, of the 1st March, especially referring to the contract, and by the resolution signed by the defendant on the 12th April, also referring to it.

3rd—I think this action was well brought against the defendant, who alone signed the contract, and if a non-joinder were relied upon, it should have been regularly pleaded, not in bar, as it was, but in abatement, as it was not. On this point, therefore, as well as on the two preceding ones, our judgments are in favour of the plaintiff; but upon the

4th—I cannot entertain a doubt that our decision must be in favour of the defendant.

He was acting solely as an agent of the Government—he was declared against as “Chairman of the Road Board of Brigus,” and was expressly recognized by the plaintiff when the contract was entered into as acting on behalf of the public.

Now, there is no proposition in the law better established than that which declares that an individual contracting in his official capacity, or as an agent of the Government, is not personally liable on the contract so entered into; such rule arises from motives of public policy, for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of private suits.—*Gidley vs. Lord Palmerston*, 3 B. & B. 286; *McBeath vs. Waldemand*, 1 S. R.; *Hall vs. Smith*, 2 Bing.

This action, therefore, is misconceived; the plaintiff has established no valid claim against this defendant and he must become non-suit.

We regret that the law compels us thus to dispose of this case, because—although the jury under the evidence negated the presence of corrupt or interested motives in the defendant—it is plain to us that he, and those on the board concurring with him in breaking the plaintiff’s contract, have acted unfairly and oppressively towards him. By the evidence it appeared that after the plaintiff had been six weeks engaged in performing his agreement, and had provided the requisite means to complete it, the board, by a majority of one, attempted through a resolution to exact from the plaintiff a particular description of Indian meal, or an abatement in the stipulated price, whilst his contract enabled him to supply any description of meal, whether white or yellow, provided it was sound and good, at the same price.

The resolution was silent as to the quality of the meal supplied, but when the plaintiff refused to make any such abate-

ment the board then relied upon the alleged bad quality of the provisions he had supplied, the chairman (defendant) producing a sample of the objectionable meal; that sample was examined by the board, and two out of five members declared that it was sound and good. The plaintiff then invited the defendant himself and a deputation of the board to examine his whole stock; they refused to make any examination, and the board, by the said majority of one, there and then terminated their agreement with him "without any justifiable cause."

The law confers certain immunities upon Government Boards (as the plaintiff here has found to his cost) and in return for such protection it expects the very best faith to be always exhibited by such boards towards all with whom they deal, and, as reference was made upon the argument to the fact that the Attorney General had not interposed on behalf of the defendant, we think it proper to observe that in our opinion that learned gentleman exercised a sound and wholesome discretion in leaving the defendant—under the circumstances appearing in this case—to extricate himself as best he could without the intervention of public functionaries or public monies from the position in which he has placed himself.

The court is unanimously of opinion that the plaintiff's rule must be discharged, and the defendant's rule for a non-suit must be made absolute.

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1867, *January*. HON. MR. JUSTICE ROBINSON.

*Will—Execution of—27th Vic., cap. 13—Testamentary capacity—Undue influence—  
“Notes of last will and testament”—Witness attesting by his initials—  
Form of attestation.*

The testator, shortly before his death, gave instructions to his solicitor as to the disposition of his property by will. These instructions were reduced to writing by the solicitor on the paper propounded as the last will and testament of testator, and headed “Notes of last will and testament.” The notes were taken down in the presence of testator, and read over and assented to and signed by him in the presence of the solicitor and another witness, who signed their names as witnesses, the former by his initials. There was no attestation clause. It also appeared there were legacies inserted or added subsequent to the signatures of testator and witnesses, but at the former’s request.

*Held*—It is a sufficient attestation to a will for a witness to sign the initials of his name.

*Held*—That the subscription of the witnesses without any words of attestation was a sufficient compliance with 27th Vic., cap. 13—(Newfound’l’d Wills’ Act).

*Held*—Clauses added after attestation are void, not having been duly signed by testator and attested.

THIS matter comes before the court upon the petition of Julia Tarrahan, widow of Patrick Tarrahan, who prays that letters of administration to the estate of her late husband be granted to her as upon an intestacy; her application is opposed by the son of deceased, John Tarrahan, who denies that his father died intestate, and he propounds the paper-writing hereinafter mentioned as his will, and prays that it be admitted to probate.

The validity of this document as a will is disputed by the widow, and a considerable mass of evidence has been taken pro and con.

The questions of law and of fact involved are important; they have been well considered at the bar, and I do not think that any point calculated to serve the interests of the parties concerned on either side has been omitted by the learned counsel respectively retained.

We have heard the Attorney General (Carter) and Mr. J. Little in support of the will, and Mr. Pinsent, Q. C., and Mr. Kent against it, and from their statements and evidence it appears that the deceased died on Tuesday, 7th August last, in St. John’s, aged about 84 years. He had been a man of sober and industrious habits, and had acquired a good deal of landed property in St. John’s, which he managed to the end. His health became enfeebled during the last few weeks of his life,

but his mind does not seem to have become weakened until a very short period before his death.

His widow is an aged woman; for several years she had not been upon speaking terms with their only son, who was consequently estranged from his father's house, and the deceased was led not unnaturally to seek assistance and counsel in the management of his affairs from his nephew, Patrick McGrath, in whose intelligence he appears to have confided.

I think it is plain that McGrath had acquired considerable influence over his relative, but in no instance do I find that he employed it for the promotion of his own interests.

On Friday, 3rd August last, the deceased had been investigating with McGrath the state of his affairs, he had freely discussed with him the mode in which he should dispose of his property by will, and by desire of deceased McGrath requested the attendance on the deceased of Mr. Joseph Little, who is a barrister and attorney of this court.

Mr. Little accordingly, on the afternoon of that day, called upon the deceased, whom he found sitting in his chair in his bedroom.

He was then, as Mr. Little swears, "in a very feeble state, but, in his opinion, of sound mind and memory, and conversed sensibly and coolly on the matter in question." McGrath also deposes to the testator at the time "being of sound mind, memory and understanding; he was apparently quite composed and happy enough." "He seemed pleased with the proceedings, and afterwards expressed his satisfaction to me that he had arranged his business."

At first deceased suggested to Mr. Little to obtain from McGrath the necessary information as to the mode in which he (deceased) desired to dispose of his estate, but Mr. Little properly insisted upon receiving instructions from the lips of the testator himself; whereupon he dictated to Little his wishes, which Little reduced to writing on the paper produced, headed "Notes of last will and testament." And, when he had finished the instructions, he read them distinctly to the deceased, who assented to and approved of the whole. He then subscribed his name in full to the paper in the presence of Little and McGrath, who at the same time, in presence of testator and of each other, signed their names as witnesses, the former by his initials "J. I. L.", the latter by his name in full.

The only persons present with testator during these transactions were Mr. Little, Mr. McGrath, and a grand-daughter of the deceased, aged 12 or 14 years.

After the paper had been so signed by the deceased and the witnesses, four more bequests were added by Little to the paper at the instance of deceased, concluding as follows: "balance to," &c.; but whether that addition was made then and there in the presence of testator, or at a subsequent period in Mr. Little's office, is not clear under the evidence; it is, however, a matter of no importance, because wherever and whenever made they have not been signed by the testator or the witnesses.

Mr. Little took away the paper thus subscribed from testator's house for the purpose of preparing a formal will to be executed by deceased on the following day.

During the dictation of the instructions to Mr. Little the deceased frequently referred to McGrath, and McGrath made several suggestions to deceased respecting them, but the evidence does not raise on the minds of the judges a doubt of the competency of the testator to decide for himself, or that in any instance he did not determine freely and voluntarily according to his own judgment and pleasure; nor on the face of the document is there anything to cast suspicion upon the testimony of Mr. Little or of McGrath, for neither of them takes any interest under the alleged will, and both have renounced the office of executors.

In consequence of threats and obstruction offered by the widow it was only on Tuesday, 7th—the day on which he died—that Mr. Little was permitted again to see deceased, at which time he was not capable either physically or mentally of attending to business, and he died without executing the engrossed will.

On behalf of the widow several objections have been raised to the admission of this paper-writing to probate which are included within the following heads:—

First—That it was obtained whilst deceased was incapacitated by mental and physical infirmity to make a valid will, and was obtained under undue influence exercised by McGrath.

Second—That it is inoperative as a will, because it does not contain the final disposition of deceased, purporting to be no more than instructions for a future will, and that those instructions are not conformable with what appears by extrinsic evidence to be the wishes of deceased.

Third—That even if the paper-writing were not open to either of the foregoing objections it is void as a will under our Wills' Act, 27th Vic, cap. 13, for want—

1st—Of the signatures of two witnesses, initials not constituting a signature in law as contended ;

2nd—Of an attestation clause, or some words to shew that the witnesses signed *as witnesses*.

It will be convenient to dispose of these objections in their order, merely premising that several of the authorities cited by Mr. Pinsent had reference to the law as it stood in England prior to the 1st Vic., and not to the law as it now stands both in England and Newfoundland.

First—The mental capacity of the deceased to make a valid disposition of his property at the time Mr. Little took his instructions must be gathered from all the circumstances of the case.

Mr. McGrath states that on the forenoon of the day in which the instructions were written by Mr. Little, he (McGrath) went through the rent roll of deceased with him, who then carefully estimated the amount he had to bequeath ; he detected a small error, as he thought, in the rent payable by a tenant named White, commented upon certain settlements he had previously made to some of his daughters, and finally arranged and directed that Mr. Little should be sent for to prepare his will.

In the instructions which at a later hour in the same day he dictated to Mr. Little, he appears to have conformed to his previous intentions. He then intelligently discussed several of his proposed legacies, and he has made the aggregate of his bequests closely correspond with the amount of his property.

These facts furnish very strong evidence of testamentary capacity, especially in the case of one who has never been subject to mental aberrations, and there is little if any evidence to rebut them.

The physician and the clergyman who attended the deceased during his last illness are not examined on either side, whilst the testimony of the widow and daughter Catherine, who alone questioned the testator's capacity is not, from its speculative nature, entitled to much weight. The widow certainly says, "I don't *think* he was in a fit condition to attend to business—to make a will" on Friday, but it is observable that she prefaces this expression of her opinion by declaring the *fact* "I don't know his state on Friday." Catherine Tarrahan also says, "I *think* my father was not in a fit condition to attend to business—was not of sound mind on the Friday and Saturday preceding his death, but I *will not swear* to it."

Now, the eminent judge of the Prerogative Court, Dr. Lushington, lays it down as a judicial dogma, that a judge must form his own judgment, not so much by the *opinions* of witnesses, as by the facts they prove; and the wisdom of the rule is apparent in the present case, for whilst Miss Tarrahan thus expresses her opinion of her father's mental incapacity on Friday and Saturday, she deposes to two circumstances which materially tend to shew that she was mistaken, and that the testator later still was very capable of transacting business; she says: "On the morning before he died (Monday) he told me to send for McGrath, that he wanted to see him about his bank-book, and I sent for him. He came, and they two were speaking of the bank-book. McGrath said he gave it to his daughter. Mr. Tarrahan called me and I went to his bedside," &c., &c. And again, "the night before he died my father told me there were £120 in the bank," which was about correct. Such facts corroborate the testimony of McGrath and Little, in truth there is nothing to impeach the veracity of the former, a disinterested relative whom the deceased knew and trusted, and there is no conceivable reason for doubting the oath of the latter, the testator's own solicitor, whose judgment is equally unbiassed so far as we can see by interest, and whose integrity and intelligence are alike unquestionable.

As regards, therefore, this ground of objection, we are clearly of opinion that the testator was, at the time he dictated and signed the notes of will prepared by Mr. Little, of sound and disposing mind, memory and understanding.

The question of what is or is not "undue influence," is one upon which great difficulty is sometimes experienced. Each case must depend upon its own facts, for there is no standard whereby a man's capacity to perform a given act, irrespective of the influence of others, can be measured; the wisest men are influenced by the counsels and wishes of their family, their friends, their professional advisers, and this influence is usually great just in proportion to the respect in which such advisers are held by a testator.

Sir John Nicholl, in *Kingleside vs. Harrison*, 2 Phil., has given a definition of "undue influence," which has been adopted in subsequent cases, and in 1852 was accepted by Dr. Lushington in *Stultz vs. Schaeffe*, "the influence to vitiate an act must amount to force and coercion destroying free-agency."

In the present case McGrath is said to have used influence over Mr. Tarrahan in the matter of this will, but I may adopt

the very words of the same great judge whom I have last quoted, "true, he may have used his influence in procuring that will, but the mere exercise of influence which one friend has over another without fraud will never vitiate a duly executed instrument."—*Bryan vs. White*, 5 E. C. L. & C. R., 582.

In estimating a man's acts we must consider the probabilities arising from motives, and it is impossible to discover any motive that McGrath had to exercise coercion or practice fraud upon his uncle. He is not, as I said before, a legatee for one farthing, presently or prospectively, and the only suggestion of an improper motive, namely, an unkindly feeling towards the widow, is negatived by the evidence, for it appears that the deceased had proposed to bequeath to his widow only £30 a year, and that McGrath it was who pleaded for her and induced his uncle to leave her £50 a year.

It may be useful to contrast the facts in this case with those proved in *Edwards vs. Fineham*, 4 M. P. C., 198, wherein Sir Herbert Jenner Fust upheld the will, and the Judicial Committee of the P. C. confirmed his judgment.

A Martha Yeomans, the testatrix, died in 1841. She was considerably advanced in years, and nearly if not altogether blind. She had made a will in 1840, bequeathing legacies to her relations. She made another will in 1841, in which she diminished the legacies to her relations, and disposed of the residue of her estate to "her dear friend, Mrs. L. C. Lane," then staying at her house. This will was impeached upon the ground of undue influence exercised by Mrs. Lane.

The solicitor who prepared both wills described the state of affairs on the occasion of the first will: "She was blind, undoubtedly, as it seemed to me, for she required to be assisted in everything that she did. I did not notice that she had lost her memory, but of that I had little opportunity of judging, for Mrs. Lane was present and to her the deceased deferred, and Mrs. Lane spoke for her on every particular almost; when any question arose she applied to Mrs. Lane, saying in her usual gentle manner, 'Well, Emma, shall I do so and so?' But I cannot say that her manners had become or were childish." On the subsequent occasion, when he visited the testatrix for the purpose of preparing the second will, whereby Mrs. Lane was to become the residuary legatee, he stated that he was summoned by Mrs. Lane, and "that in each instance in which a question was raised as to the propriety of such and such a bequest, the deceased applied to Mrs. Lane, and in each in-

stance it was decided by the opinion Mrs. Lane gave. It appeared to me throughout the interview that the deceased was entirely under the influence of Mrs. Lane. She never spoke her mind so as to give a decisive opinion on any question that arose in respect of the will, whether raised by herself or by Mrs. Lane, but whatever Mrs. Lane suggested she at once assented to as if she felt herself indifferent on the subject; but whether she was wholly incapable of forming a decisive opinion for herself I cannot say." One of the witnesses to the will stated that it was Mrs. Lane who guided the hand of the testatrix to the place where the signature was to be made; and other witnesses deposed that the deceased had several times stated that her nephews and nieces should at her death have the property. As I have said, that will was upheld, not a tithe of the questionable circumstances which there appeared exist here, and we think there are no grounds whatever for imputing "undue influences" to Patrick McGrath.

Second—It is undoubtedly good law, as urged by Mr. Pin-sent, that "instructions for a will" or "notes of a will" must appear to contain the final intention of deceased as regards the disposition of the property actually referred to, before it can be upheld as a will it must be the final resolution of the testator *as far as it goes*; *Will on Ex. 53*—that upon which he had fully made up his mind. Upon this point also I wish to follow precedent; the decision in *Huntingdon's Will*, 2 *Phil.*, is a safe guide for us. There the testator detailed his intentions to his attorney, who took them down from his mouth and read them over to him, and the testator approved of them and desired a fair copy to be prepared for his execution, as a will, on the morrow; he died, however, during the night, but the facts were held to be conclusive evidence of his having fully made up his mind, so far as the bequests in the will had gone. The same rule must follow the like facts in the present case.

Then, as regards the legacies inserted subsequently to the signature of Mr. Tarrahan and the witnesses; *Nathan v. Morse*, cited by the Attorney General, is apposite in principle, although it was decided long before the Wills' Act was passed which has invalidated almost all testamentary dispositions not signed by the testator. In that case the testator died in the act of dictating instructions to his solicitor, and had proceeded as far as the clause appointing executors, when he was attacked by the seizure which terminated his life; immediately after his death a third person present reminded the solicitor that the de-

ceased had directed a legacy which the solicitor had omitted, whereupon the solicitor, recollecting the fact, immediately added it.

Sir John Nicholl said he had no doubt in pronouncing the instructions to be the will of the deceased so far as the appointment of the executors, but no farther; and so are we of opinion that the notes prepared in this case down to the signature of Patrick Tarrahan and the witnesses constituted a valid will, and must be admitted so far to probate, but that the writing added subsequently—even if it had been written in the presence of the deceased, would have been invalid under the old law for want of completeness, and is, under our Wills' Act 27 Vic., cap. 13, void and must be rejected, not having been duly signed by the testator and attested.

The only objection remaining to be disposed of is the—

Third, viz.—That the signature of Mr. Little as a witness by his initials is not sufficient, and also that there should be an attestation clause, or some words to show on the paper that the witnesses signed as such.

It is observable that the words in the Wills Act which prescribes that the will shall be executed by the testator, and that which prescribes that it shall be subscribed by the witnesses, is one and the same, shall be “signed,” &c, simply signed.

It is settled that a will may be signed by a marksman as testator, and attested by a marksman as witness.

I see no reason why it may not be attested by initials.

The question in Saveray's case, 6, *E. C. L., Lock, 582*, was, whether the signature of the testator by his initials was sufficient, and it was held to be so.

The very point now raised, was in effect determined in Christian's case, 9 No., in which the signature by one of the attesting witnesses—by his initials was considered sufficient to satisfy the statute—and in a case determined in England in March, 1865, one of the witnesses signed no name but merely wrote “servant of Mr. Sperling,” and that was held to be a sufficient signature under the statute.—*Goods of Sperling, 3, S. & T.*

Then as regards the necessity for some attestation clause, the point was raised and determined in the negative in *Roberts and Phillips, 4, E. & B.* It was again similarly decided in 1851 in *Bryan and White*, already cited, and must be ruled in like manner now by us.

Upon the subject of the costs of these proceedings we have had some difficulty in arriving at a satisfactory conclusion.

The litigation has been almost, if not altogether occasioned by the conduct of the widow in preventing her husband's solicitor having admission to him with the engrossed will, which conduct appears from the evidence to have been unwarrantable, and under ordinary circumstances we should therefore have been constrained to order her to pay the costs of a suit she had improperly occasioned and unsuccessfully prosecuted.

But we think she had reasonable grounds for entertaining some suspicions of the fairness of the proceedings, in consequence of the deed of settlement upon her which her husband had instructed Mr. Kent to prepare a few months before his death, not having been executed according to promise, she was justified in desiring to have the alleged will thoroughly established by evidence, and we will therefore allow her out of the estate the costs of filing the necessary petition for administration and of attendance at the examination and cross examination of the witnesses called to establish the will, but no more.

I have been thus careful to explain the reasons of our decision, because the statute now regulating the execution of wills in this colony is of recent origin, and we are desirous that in such important matters as testamentary causes wherein a man's whole estate is involved, and in which the judges are required to determine both upon law and fact, suitors should be satisfied that their rights are not capriciously disposed of but that our judgment is guided by authority and is supported by precedent.

The judgment of the court is that the notes of the will as propounded and proved by Mr. Little down to the signature of testator and witnesses inclusive, and no further, be admitted to probate as the last will of Patrick Tarrahan, and that administration, with that will annexed, be granted to John Tarrahan, upon his filing the usual security, and that the taxed costs of administrator be paid out of the general estate.

*Attorney General (Mr. Carter, Q.C.), and Mr. J. I. Little, in support of will.*

*Mr. Pinsent, Q.C., and Mr. Kent against the will.*

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1867, *January*. HON. SIR H. HOYLES, C.J.

*Principal and agent—Master and servant—Medical attendance for servant—  
Power of servant to bind master.*

Where a telegraphic repairer whilst engaged in the business of the company accidentally received a severe gunshot wound, he was sent for medical treatment to a physician by the operator under whom he was working. The operator, it appeared, had no authority to contract debts on behalf of the company except to a trifling amount. The occurrence was communicated to the company. No proof was given that the company had notified the physician that they would not be liable until after the expenditure had been incurred. In an action by the physician the jury gave a verdict for \$130. On a rule nisi to set aside the verdict,

*Held—(Discharging the rule).* Where a principal, having received information by a letter from his agent of his acts touching the business of his principal, does not within a reasonable time express his dissent to the agent, he is deemed to approve his acts and his silence amounts to a ratification of them.

THIS action was brought by the plaintiff to recover from the defendants a sum of fifty-one pounds, an expenditure alleged to have been incurred by the plaintiff in the cure of a gun-shot wound accidentally received by one — Bailey, a servant of the defendants, while occupied in the service of the company.

The principal facts of the case, as they appeared at the trial during the present term, were that in the beginning of June, 1866, Bailey, whilst engaged in repairing the telegraph line, or in making a wall in connection with it, in the neighbourhood of Conn River, Bay Despair, received a severe gun-shot wound from the accidental discharge of a gun by an Indian who accompanied him, and was sent by Mr. Leslie, the operator in charge of the station at Conn River, under whose orders Bailey was working, to the plaintiff at Gaultois for medical treatment.

Upon his arrival at Gaultois the plaintiff sent a messenger to Leslie to inquire who would be answerable for Bailey's expenses, and received in reply a letter from Leslie, in which, after requesting that the wounded man should receive all possible attention, the writer stated that he had informed the company "*of the occurrence*," and added that they would pay all expenses, and if not, that he, Leslie, would.

Upon the faith of this assurance the plaintiff procured medical assistance from Harbor Briton and supplied Bailey with food, lodging and other necessaries for a period of seven weeks, until he was sufficiently recovered to return to Conn River, where he again entered the service of the defendants as a cook.

A demand subsequently made by the plaintiff upon the defendants' superintendent, Mr. McKay, for the expenses thus incurred, was repudiated on the ground on which the action was principally defended, namely, that Leslie had no authority to pledge the credit of the company to the expenses of Bailey's cure.

Upon the defendant's case it appeared that Mr. McKay, who at the time of the accident was absent in Cape Breton, had heard of it in about a week after it occurred. They offered no evidence to shew that, if aware of their credit being pledged (of which the only proof was the inference to be drawn from Leslie's letter to the plaintiff), they had denied their liability before being asked for payment, or had countermanded Leslie's orders, or signified to the plaintiff that they would not hold themselves responsible for the expenditure he had authorized; but Mr. McKay stated on his examination that Leslie's duties were to work and maintain that part of the telegraph line which was under his management, and that he had no authority, except to a very trifling amount (under £10), to contract debts on behalf of the company.

Mr. Justice Robinson directed the jury substantially to the effect that if Bailey's immediate cure was necessary for the working or maintenance of the line, or, if they were satisfied that the defendants had in any way ratified Leslie's act in pledging their credit in this particular, they should find for the plaintiff, but for reasonable expenses only actually incurred; and that if they were not satisfied upon one or other of these points they should find a verdict for the defendants.

After a short consultation the jury found a verdict for the plaintiff for one hundred and thirty dollars, thus reducing the plaintiff's claim by about one-third.

To set aside this verdict and enter a non-suit on the ground that Leslie had not been shewn to have had authority to bind the company by his orders, or for a new trial on the ground of excessive damages, the proof of payment of the doctor's bill (£24) being insufficient, a rule *nisi* was obtained by the defendants, and recently argued by Messrs. Pinsent, Q. C., and A. Emerson for the company, and by Mr. Hogsett for the plaintiff.

The court took time to consider their judgment, and I have now to express my opinion upon the points raised by their rule.

Generally speaking, a master is not liable for medical attendance and medicines supplied to his servant, unless he has himself ordered them.

In the present case, that orders were given by Leslie, an agent of the company for some purposes, is not disputed, but the authority of Leslie to give these orders and any subsequent ratification of them by the company are denied; and we have now to determine, first—whether Leslie had originally authority to bind the company for the cure of Bailey; and, if not, secondly—whether there is evidence from which the jury might reasonably have inferred an adoption or confirmation by the company of Leslie's act.

Upon the first point, although it is clear, not alone upon general principles, but upon the authority of *Cot vs. the Midland Counties Railway Company, 3 Exchequer*, that Leslie, whose sole duty it was, as operator and station inaster, merely to work and maintain the line within his district, would have ordinarily no authority to bind his employers by a special contract of the character here sued upon, yet upon the trial, taking into account the admitted necessity at that particular time, when the arrival of the Atlantic cable was daily expected, of keeping the line in full repair, the isolated position of Leslie and his inability within a short time to procure substitutes for any of his staff who might be disabled, I was inclined to think that under the exigency arising from these circumstances and the nature of the accident itself, Leslie would of necessity be clothed with sufficient authority in this particular case to pledge the credit of the company for medical assistance which was imperatively necessary, and which could not otherwise be procured.

The fact, however, of Bailey's wound being of a character that precluded all hope of his being able to return to his former employment within a period much greater than would be necessary to enable the company to procure another person in his place, would seem to dispose of this argument and to leave this case, so far as the question of original authority is concerned, to the operation of the rule that would place Leslie's act beyond the scope of his ordinary powers and duties; and, therefore, unless the plaintiff can sustain his verdict upon the second point the rule for a non-suit must be made absolute.

The evidence relied upon to show a ratification was the communication of Leslie to the company above referred to and the absence on the part of the defendant's of all proof of their

having notified the plaintiff until after the expenditure in question had been fully incurred, that they would not hold themselves liable on the guarantee given by their agent on their behalf; and, I am of opinion, that these facts taken in connection with the other circumstances of the case were reasonably sufficient to justify the jury, with whom it lay to determine all questions of fact in the cause, in coming to a conclusion that the defendants were aware and approved of Leslie's proceedings.

When Leslie communicated to the defendants, what, in his letter to the plaintiff he terms "*the occurrence*," it may fairly be presumed that he informed them, not merely of the accident itself, but also of the measures that he had taken for the relief of the wounded man. The defendants would know that his cure must be at someone's expense, and the only persons who, as the case would be put before them by Leslie, could be liable were Leslie, Bailey himself, and the company. But the condition in life of the two former precluded the supposition that they would be the parties to whom the credit would be given, and Leslie's communication to the company being in the capacity of agent, it would naturally follow that they would understand his acts in relation to the same subject to be performed in that character. Further, Leslie's declaration *that the company would pay all expenses, and if they would not that he would*, while it conveys the idea that the company's credit was only conditionally and not absolutely pledged in the first instance, implies also that he had informed them of the pledge he had given in their behalf and that he was then waiting to hear if they disapproved of it, and if Leslie had really kept the company in ignorance of what he had done, or if they had, as they were fairly bound to do if they disapproved of it, disavowed his act, and thus prevented a further expenditure by the plaintiff under the mistaken belief that he would be re-imbursed by the company, nothing was easier than for them to have proved this at the trial. But nothing of this sort was done or attempted, and the jury were necessarily left to draw their own conclusions from the facts proven by the plaintiff on the one side, and the absence of the negative testimony by the defendants on the other.

It was certainly urged by Mr. Emerson at the argument of the rule that Mr. McKay had stated on his examination that the first he heard of Gallop was upon the bill being presented to him; but, if such a statement was made, and it is not to be

found upon either Judge Robinson's notes or my own, it would obviously weigh but little in the absence of Leslie's telegrams to the company.

The principle of law which, in my judgment, should govern the court upon this state of facts, is that laid down in *Story on Agency*, sec. 258 :—"If a principal, having received information by a letter from his agent, of his acts touching the business of his principal, does not within a reasonable time express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification of them,"—and applying this rule to the circumstances of this case, I am of opinion that the finding for the plaintiff ought not to be disturbed.

Upon the ground of excessive damages it was urged by the defendants' counsel that there was no voucher for the payment of the doctor's bill (£24), and that the charges in the plaintiff's account generally were excessive; but at the trial, the court concurring in this opinion, directed the jury accordingly, and they consequently reduced the whole account considerably, and I do not see that we ought further to interfere with the exercise of their discretion in a matter so peculiarly within their own province.

The right of the plaintiff to recover the doctor's bill in this action, or so much of it as the jury have manifestly allowed, is not, I think, open to question, as his services were rendered upon the express order and sole credit of the plaintiff, who would be entitled to receive them under the count for work and materials, although the proof under the count for money paid might be effective.

Upon the whole case, therefore, I am of opinion that this rule should be discharged.

*Mr. Hogsett* for plaintiff.

*Mr. Pinsent, Q. C.*, and *Mr. A. Emerson* for defendants.

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1867, January. HON. SIR H. W. HOYLES.

*Trespass—Negligence—Master of tug—Injury to pier—Master of ship paying damage—Right to recover from wrongdoer.*

Where the captain of a tug wrongfully took a ship from a place of safety and left her in a dangerous situation whereby she injured a neighboring pier, the owner of the ship without any consultation with the captain of the tug, compensated the pier owner for the injury done. A jury found a verdict against the master of the tug for damages to the vessel and for the amount paid to the owner of the pier. On a rule nisi to set aside the verdict for the latter amount,

*Held*—By paying for the injury to the pier without consulting the captain of the tug the owner of the ship acted without authority and could not, therefore, under the well known rule of law which precludes a volunteer from recovering over the debt of another paid without request of such other and without any legal obligation on his part, recover from the master of the tug the amount mistakenly paid by him.

IN this action the plaintiff sought to recover from the defendant, the master of the steam-tug *Dauntless*, damages for a trespass committed by him in wrongfully removing the plaintiff's vessel, the *Champion*, from the wharf of Messrs. Harvey, Tucker & Co., to the stream, whence she was driven by the wind against the wharf of Mr. Fox, thereby damaging the wharf and herself, to the extent as was alleged of one hundred dollars.

The circumstances of the case, so far as they are material to the present issue, are as follows:

On the thirteenth of November, and for some days previously, the *Champion* lay at the wharf of Messrs. Harvey, Tucker & Co., discharging cargo. Early in the morning of the 13th she finished discharging, and shortly after, about eleven in the forenoon of that day, the wharfinger requested the mate to have the vessel removed into the stream to make room for a barque which was waiting to come to the wharf. The mate informed the wharfinger that he had received no orders upon the subject, but that he would acquaint the master, who was then absent in the town, with his request; and to the delay that would be thus occasioned the wharfinger assented. Upon the master's return to the ship at dinner time, the mate informed him of the notice to remove; but the master replied that he had received permission to stay all night; and after dinner returned to town to collect his freight. There was no satisfactory evidence of any such permission having been given, but between three and four o'clock in the afternoon Mr. Meehan, of the firm of Harvey, Tucker & Co., came upon the

wharf and ordered the vessel to be immediately hauled off. With this order the person then in charge, the second mate, declined to comply ; as well because he had received no orders to that effect from the master, as because a gale of wind which was then springing up, rendered it unsafe at that time to remove a large and empty vessel such as the *Champion*, into the stream. Mr. Meehan thereupon sent a number of pilots on board to haul the vessel off, with directions, if necessary, to employ the steam tug on that service. The pilots finding themselves unable to remove the vessel, did engage the tug, by which the *Champion* was hauled off a short distance from the wharf and then cast off, it being found impossible to remove her further in consequence of her anchor having become foul. The wind increasing in violence the *Champion*, in the course of the night, notwithstanding the efforts of the master and crew, who were engaged all night in endeavoring to prevent her doing injury to herself or others, was driven against Fox's wharf, and thus did and received the damage complained of. The plaintiff, without consulting or giving notice to the defendant, paid the owner of the wharf ten pounds in compensation of the injury he had sustained, and then instituted this action to recover as well that amount as the sum of fifteen pounds, the estimated cost of repairing the damage done to his vessel.

At the trial Mr. Piusent, Q.C., for the defendant, objected to the admission of any evidence of damage to the wharf, but it was nevertheless admitted subject to his exception.

The Chief Justice directed the jury, that the *Champion* being in the first instance *lawfully* at the wharf, could not be required to remove at a time when removal would endanger her safety, unless the master had previously received a reasonable notice to quit, to which he could without risk have conformed, but which he neglected to obey ; and he left it to the jury to say, first, whether having regard to the state of the weather and the condition of the vessel, she being without cargo or ballast, it was a proper time to remove her into the stream, when she was cast off by Mr. Meehan, and if not, secondly, whether the master had received a reasonable previous notice upon which, under the evidence, he could and therefore ought to have acted by removing the vessel to a place of safety before the gale sprang up ; and if they were of opinion in the negative upon both points, they should find for the plaintiff, but otherwise the verdict should be for the defendant.

The jury found a verdict for the plaintiff, for the whole amount sought to be recovered.

After the trial, Mr. Pinsent for the defendant, moved upon several grounds for a rule nisi for a new trial, but the Court, approving of the finding of the jury, gave a rule upon one point only, the improper admission of the evidence respecting the wharf, and of this rule, which was subsequently argued by Mr. Pinsent for the defendant, and by Mr. Prescott Emerson for the plaintiff, we have now to dispose.

By the evidence adduced at the trial, it appeared that the immediate cause of the damage both to the wharf and to the ship, was the wrongful act of the defendant in taking the vessel from a place of safety, and leaving her in a situation where, without the fault or neglect of the plaintiff, she was exposed to the force of a *vis major*, (the gale then blowing) by which she was driven with violence against the wharf. For the injury thus occasioned the defendant, and those under whose orders he acted, would alone be responsible; no liability would attach to the plaintiff or to his ship, as the latter was an innocent instrument of the defendant's wrong, and the former had not been guilty, either of negligence or of wilful fault. See *Addison on Wrongs*; titles "Trespass," "Negligence;" *Roscoe's N. P.* 462; *Latch and Hummu, R. C.* 27, *L. J.*

In assuming, then, under such circumstances, to compensate Fox for the wrong of another by paying for the injury to the wharf without consulting the wrongdoer, the plaintiff acted without authority, and he could not, therefore, under the well known rule of law which precludes a volunteer from recovering over the debt of another paid without request of such other and without any legal obligation on his own part, recover from the defendant the amount thus mistakenly paid by him to Fox.

We must, therefore, direct that the damages be reduced, but as the equities are altogether with the plaintiff, and we decide against him on this point only because we are compelled to do so by a strict rule of law, we refuse the defendant's application for costs.

Rule absolute without costs.

*Mr. P. Emerson* for plaintiff.

*Mr. Pinsent, Q. C.*, for defendant.

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1867, January. HON. MR. JUSTICE ROBINSON.

*Practice—Principal and agent—Owner of ship and master—Death of Master—  
Acting master, power to bind owner—Service of writ on acting master  
—Defendant beyond jurisdiction.*

Where the defendant resided in Wales and the master of his ship had died at St. John's, Newfoundland, where she had put into for repairs.

*Held*—That the acting master of the ship (the mate) is to be deemed the recognized agent of such owner for the purpose of compelling him to accept service of a writ on behalf of the owner.

MR. HOGSETT and Mr. Little were heard by me to-day in shewing cause to an order *nisi* granted by me at the instance of the Attorney General to set aside the writ and proceedings in this cause for irregularity by reason of the plaintiff omitting to endorse the notices on the process required by the statute 27 Vic. cap. 9, where the defendant resides beyond the jurisdiction, and has no recognized agent therein, and also for omitting to endorse the amount sworn to—or that the time for pleading be enlarged.

The Attorney General was heard in support of the order. The facts are briefly as follows:—

The defendant is the owner of the brig *Leah*; he lives in Wales; he has never been in this colony; his ship, under the command of Thomas Evans, was damaged in August passing through the Straits of Belle Isle, and bore up for St. John's to refit.

She arrived here on the 12th Sept., at which time the captain was dying, and did die on the 19th Sept.

The mate of the vessel, Griffith Williams, upon the master's death, took charge as acting master *ex necessitate*, and without any reference to or by owner.

On the day of the ship's arrival, viz., 12th Sept., the plaintiff was employed under a written document by the captain, with the concurrence and signature of the mate, to act as broker and to make the necessary repairs to the ship, and the charges on which this suit professes to be founded arose wholly in St. John's, and are sworn to have occurred in consequence of this employment and mostly with the knowledge of the mate—they principally concern the ship and her proceedings in St. John's, and are such as—whether well or ill-founded—the absent owner was ignorant of, and could give no information upon; they amount to \$522.23, and for the purpose of recover-

ing that sum the plaintiff has attached the vessel, which is now held by the sheriff, and a copy of the writ has been served upon the acting master in the absence of the owner.

The principal question for me to determine is whether such acting master is or is not to be deemed "*the recognized agent*" of such defendant under those circumstances, for the purpose of compelling him to accept the service of the writ on behalf of Mr. Jones, his owner.

The question of agency is one which essentially depends in every case upon the special facts in such case, and, without entering at length into the reasons which influence my judgment, it may be sufficient for me to say that under the circumstances now laid before me on affidavits, coupled with the law which arises therefrom, I am of the opinion that the acting master, Griffith Williams, must be deemed the recognized agent of the defendant under the meaning of the Act for the purpose of appearing to this suit.

Privileges and responsibilities are reciprocal, and where, for the necessary protection of an absent ship-owner the law devolves upon the mate the power and duty of protecting the ship when the master shall die in a foreign port and of performing all necessary acts to enable her safely to reach her destination, such mate becomes by the act of the law as much the agent of the owner for such purposes as the original master was by the selection of the owner. It is his duty, and, therefore, he is by law empowered to relieve the ship so far as he can from undue restraint and detention, and to defend her in court and out of court to the extent of his ability from unfounded claims.

On the other hand, it is to the interest of trade that those who deal honestly and in the usual course with a ship in a foreign port through the officer in charge of her, shall not be vexatiously delayed in the recovery of their debts, and shall be entitled to consider that officer as much the agent of the owner to pay as to incur debts for the ship, and to carry her on her voyage.

In determining this preliminary question that the defendant must appear and plead, of course I do not refer to the merits of a single item in the plaintiff's claim, which must be supported at the proper time and in the proper way.

If the time which shall elapse between this and the opening of the Supreme Court shall not suffice to enable the acting

master to communicate with the owner, the court will, no doubt, on a sufficient affidavit, extend the time.

The omission to endorse on the writ the amount sworn to is an error of the plaintiff which the defendant has correctly excepted to; it is not, however, of much moment and is amendable, and I authorize the plaintiff accordingly to amend it.

I discharge the rule *nisi* without costs on either side, and I enlarge the time for the defendant to appear and plead for two days.

*Mr. Hogsett and Mr. Little* for plaintiff.

*The Attorney General* for defendant.

## McLOUGHLAN v. KOUGH.

1867, *July*. HON. MR. JUSTICE ROBINSON.

*Vendor and purchaser—Transfer of property necessary to confer ownership—  
Attachment by third party.*

A quantity of seals owned by a party residing at St. Julien's, on the so-called French Shore, were shipped to a merchant at St. John's, accompanied by a letter which stated that the owner "send their winter's fat to him by James McGrath." The shipper at the time was indebted to the merchant. Before the seals were delivered they were attached by a third party and sold by the Sheriff.

*Held*—The seals had not vested in the merchant; and he would not have been bound to bear the loss if they had been lost on the voyage. They had not been purchased, had not been shipped by his order, and he had not pledged himself to accept the same.

THE plaintiff is entitled by law to my order on the garnishees, Messrs. J. & W. Stewart, to pay into court to the credit of these causes £59 10s. 9d. currency.

Mr. Whiteway, on behalf of the trustee of Kenneth McLea & Sons' insolvent estate, has failed to establish a right of property in the trustee to that sum.

The money is the nett proceeds of sixty-seven seals, which in April last were shipped at St. Juliens, on the French Shore, by Wm. Kough, on board the *Milo*, owned by Messrs. McGrath. They were part of a larger quantity shipped by the same parties and others.

These sixty-seven seals were accompanied by a letter addressed to Mr. John McLea; the master understood that they were intended for the McLeas by the Koughs, but he was told that the letter would contain the instructions by which he should govern himself in the disposition of the seals in Saint John's.

The letter informed McLea that Thomas and William Kough "send their winter's fat to him by James McGrath."

The Koughs were indebted to McLeas in £246 2s. 5d. for supplies furnished in 1866.

Before the seals were delivered to anyone they were attached in McGrath's hands by the plaintiff, and were sold by the sheriff, by consent, to J. & W. Stewart, for the benefit of whom they might concern.

The question raised before me was whether the seals had vested in McLeas when they were so shipped, and had become their property, so that if the seals had been lost on their passage their value would, *pro tanto*, be deemed a discharge of Kough's debt to McLeas.

I am of opinion that the seals had not become vested in McLeas, and they (the McLeas) would not have been obliged to bear the loss if the goods had been lost on the passage to St. John's, because they had not been purchased on account of McLeas nor sold to McLeas, and had not been shipped by their order or with their privity; they had not pledged themselves to accept the seals, and had no means, for want of information, of insuring them; it was wholly an unilateral proceeding on the part of the Koughs, and deficient of that mutuality of obligation which is necessary to constitute a valid contract. In St. John's the sixty-seven seals had not been separated from others and weighed before they were attached, and the McLeas did no one act to recognise the intended appropriation of them by the Koughs, so far as appears by evidence, until after the sheriff had seized them for the benefit of the plaintiff. The seals continued the property of the Koughs, and the money must be paid into court to the credit of these two causes.

I find the law sufficiently settled upon this subject—*vide Wait vs. Baker, 2 Exc. R. 1; Brawn vs. Hare, 3 H. & N., 484*, affirmed in the Exchequer Chamber, but the facts in evidence are insufficient to support Mr. Whiteway's contention.

*Mr. Little* for plaintiff.

*Mr. Whiteway, Q. C.*, for trustee insolvent estate of Messrs. McLea & Sons.

1867, *July*. HON. SIR H. HOYLES, C. J.

*Landlord and tenant—Attachment—Distress—Insolvency of tenant—Priority of landlord—Servants' wages.*

On the 8th of September, A. D. 1865, the furniture and goods of the tenant were seized under an attachment. On the 25th of November following the landlord distrained for his rent then due on the same furniture and goods as attached; no sale took place by the landlord, but he continued in possession until the 9th of December, when the tenant was declared insolvent. It was contended on behalf of the servants of the insolvent that the proceeds of the distress should be applied to the discharge of the servants' wages, on the ground that the lien of the landlord was discharged by his not selling within the prescribed time.

*Held*—That the distress was not superseded by the insolvency law nor rendered void by the delay in perfecting it, inasmuch as the delay was with the consent of the tenant, and if there had been no such consent the distress would not be void but only irregular.

THE questions raised for the judgment of the court in this case come before us by way of exceptions taken to the Master's report by creditors having conflicting claims upon the insolvent's estate.

It appears by the report that on the 8th September, 1865, the household furniture and effects of the insolvent were seized under an attachment at the suit of Kenneth McLea, and after being for a few days in the possession of the sheriff, were released upon the usual security.

On the 25th November following, John C. Withers, the landlord of the premises on which the insolvent resided, distrained upon the same furniture and effects, for rent in arrear to the amount of ninety-three pounds, but instead of proceeding to sell the distress at the usual time, he, with the consent of the insolvent, continued in possession of the goods upon the premises, until the ninth of December, when Bulger was declared insolvent under McLea's writ.

Upon the insolvency Mr. Walbank was appointed trustee, and the property distrained was transferred to his possession upon the understanding that such transfer should not operate to the prejudice of the landlord's claim, but that his rights should be the subject of adjudication in like manner as if the goods had remained in his possession.

It further appeared that on the 7th October, 1864, the insolvent executed a mortgage to Withers of certain landed property and fixtures, as security for rent due and to become due,

conditional for redemption in two years or sooner, at the option of the mortgagee, which security is outstanding and in mortgagee's possession.

Upon this state of facts, Mr. Hogsett on behalf of the servants of the insolvent contended, that the proceeds of the distress should be applied in discharge of wages in preference to the landlord's claim, on the alleged ground that as against the trustee the landlord's neglect within the time prescribed by law to prosecute to a sale his remedy for the rent, had discharged the lien he otherwise might have had, and that as well the property in, as the possession of, the goods, being then in law in the insolvent, both passed to the trustee on his appointment, and became subject to the preferences given by the Insolvent Act.

Mr. Pinsent, for the landlord, maintained (citing *Briggs and Souilly, 8 Mo. & W.*, and other authorities) that the landlord's remedy by distress was a proceeding *in rem* which was not discharged by the tenant's bankruptcy or insolvency or by his giving collateral security by deed; and that the delay attending the realization of the distress, being with the consent of the tenant, did not discharge the landlord's lien, which under the agreement between the trustee and the landlord, followed the goods into the possession of the former, and entitled the latter to payment of his rent before all other claims.

Mr. Whiteway, on behalf of the trustee, submitted that the mortgage taken by the landlord, not having been registered until within two months of the insolvency, was void under the 10th section of the Insolvent Act, and that if valid it ought to be realized before the landlord would be permitted to rank upon the estate.

Mr. Hayward, for the attesting creditor, claimed the costs of the attachment under the 15th section of the Act.

After hearing these gentlemen for their respective clients, we are of opinion that the distress (admitted to have been in the first instance legal and regular) was not superseded by any express enactment of the insolvent law, and was not rendered void or irregular by the delay in perfecting it, inasmuch as such delay was with the tenant's consent, given before the insolvency; that if the delay had been *without* such consent the distraint would not, under the provisions of the Imperial Act 11th Geo. 2, cap. 19, have been void *ab initio*, but irregular only, giving to the tenant merely a right of action for special damage against the landlord; that in either case, therefore, the

landlord's lien continued unimpaired up to the time of the delivery to the trustee under the agreement between him and the landlord, there being nothing in the insolvent Act inconsistent with or expressly determining such lien, and no implication arising against it from the general scope and policy of the Act, the provisions of which are intended, not to alter the relative rights of the insolvent and of third parties as they subsist at the time of the insolvency in his estate, but to transfer the estate to the trustee for distribution in a certain order, subject to the liens of third parties, whether created by contract or by operation of law, the only exception to this principle, apparently, being found in the first section of the Act, which discharges the legal lien arising upon an attachment of property; and that the trustee, therefore, receiving the goods distrained subject to the lien of the landlord and upon the understanding that the rights of the latter should continue unimpaired, is bound to pay the rent in the first place out of the proceeds.

Upon the points raised by Mr. Whiteway it is to be observed that, as in this case the landlord's claim is not to rank as a creditor upon the general estate, but to enforce an alleged security upon a certain portion of it, the principle that he would be bound in the first place to realize his mortgage has not any present application, and it is not, therefore, necessary to determine upon the validity of the mortgage; but as an expression of our opinion upon this point may save the estate from future litigation, we think it as well to state that the non-registration of the mortgage was not an act of the *mortgagor* void under the 10th section of the insolvent Act, but an omission of the *mortgagee*, which, under the law for the registration of deeds, would have the effect of postponing his incumbrance to claims accruing after the execution but before the registration of the mortgage, but would not render the security otherwise invalid.

Mr. Hayward's claim for costs, being against the general estate, can be allowed as against the goods distrained upon only after the landlord's claim for rent has been satisfied.

*Mr. Whiteway, Q. C.*, for trustees.

*Mr. Pinsent, Q. C.*, for landlord.

*Mr. Hayward* for attesting creditor.

*Mr. Hogsett* for servants of insolvent.

1867, *July*. HON. SIR H. HOYLES, C. J.

*Practice—New trial—Setting aside verdict—Excessive damages.*

Where the amount found by the jury was largely in excess of the amount which the evidence warranted the Court, on a rule to set the verdict aside, did not avail of its power to reduce the verdict, but left it optional with the plaintiff to enter a verdict for a reduced sum or take a new trial, the defendant in the latter case paying the costs of the first trial.

IN this action, which was commenced in May, 1866, the plaintiff by his particulars claimed a sum of \$1,200 for work and labour. The declaration contained only the common counts and the only plea on the record was "never indebted."

The defendant is a farmer and the owner of a small farm near St John's, on which he resides, and the plaintiff is his son.

The facts deposed to by the plaintiff and his witnesses, and upon which his claim rests, are—

That about ten years previous to the trial of the cause, the plaintiff, at the request of the defendant, who promised, in consideration of his so doing, to leave plaintiff defendant's property at his decease, abandoned a fishery in which he was engaged at Brigus South to come and live with his father and serve him on the farm and as a car-driver in the town. That upon this understanding the plaintiff lived with and served his father until about a year before the commencement of this action, when, at the instigation of some other members of the family, defendant turned the plaintiff and his wife from his house and service.

On the other hand, the defendant, denying altogether the alleged agreement to leave his son all his property at his decease, but admitting his services for the period mentioned, by himself and his witness contended that the plaintiff and his wife, having been maintained by the produce of the farm and the monies earned by the hire of defendant's horse and car, which monies the plaintiff received, and great part of which he appropriated to his own use, had been already sufficiently compensated for his services.

The cause was tried before Mr. Justice Emerson in the recent term of this court, and the jury returned a verdict for the plaintiff for \$480, whereupon the defendant obtained a rule  *nisi*  to set the verdict aside on the ground of the damages being excessive.

After hearing this rule argued and carefully considering the circumstances of the case, we are unanimously of opinion that the verdict should be set aside as being largely in excess of the amount which the evidence warranted the jury in finding; and we are led to this conclusion by the following considerations:

The whole term during which the plaintiff served the defendant appears to have been eight and a half years, of which term we exclude from consideration the eighteen months during which the plaintiff's wife lived in the family, as her maintenance would be more than equivalent to any amount the plaintiff would be entitled to in that time beyond what he appears to have received of the defendant's monies.

There then remain seven years for which the plaintiff would be entitled to be paid, the defendant not having availed himself of the Statute of Limitations. At the commencement of his service the plaintiff was not more than twenty years of age, and taking into account his comparative inexperience and his very exceptionable conduct to his father on some occasions, an average salary of twenty pounds per annum, besides his board and lodging, would be as much as his services would fairly be worth, and as much as his father in his circumstances could reasonably be expected to pay.

Towards the liquidation of the wages the plaintiff must, we think, have appropriated at least fourteen or fifteen pounds per annum of the monies received by him for the defendant in the payment of his personal expenses and clothing; and the sum of forty pounds would, therefore, be all that would remain to be paid to the plaintiff at the termination of his service.

Having regard, however, to the great disparity between this sum and that found by the jury, we do not avail ourselves of the power given to us of reducing the verdict and directing that it shall stand at that amount, but leave it optional to the plaintiff either to enter a verdict for that sum or to take a new trial, the defendant in the latter case paying the costs of the first trial.

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1867, *July*. HON. SIR H. HOYLES, C. J.

*Costs — Revision of Master's taxation — Disbursements for witnesses not verified by affidavit—Costs of witnesses called to prove a custom.*

The master is not precluded from allowing costs of payment to witnesses although not actually paid, if he is satisfied they have been incurred, and that the claimant is legally liable for them and will apply them to the purpose for which they are taxed.

Costs of witnesses not sworn should not be refused if reasonably incurred, nor allowed, though examined, if not necessary to the suit.

IN this case application was made by both parties for a revision of the master's taxation of the plaintiff's costs.

The grounds of exception were, by the plaintiff—

That costs had not been allowed of a declaration and roll, and of witnesses called to prove a custom, and that certain alleged disbursements for witnesses, the payment of which were not verified by affidavit, had been taxed off.

By the defendant—

That too much had been allowed for a brief fee, and for witnesses' expenses; and that the costs of a second affidavit, and of a motion for full costs, had been improperly admitted.

In general the Court will only review a taxation where the master has erred in some matter of principle, or where, in matters left to his judgment and discretion, his determination has been extreme on either side.

The present case falls we think within this rule, as in one particular the master appears to have mistaken the principle by which he should have been guided, and we therefore send the bill back for his reconsideration.

The point to which we refer is this:

Under the old rules the expenses of witnesses were to be allowed only *when their payment was shewn*. Under the recent Act for the regulation of costs, the words of the section prescribing what shall be allowed for witnesses are identical with those of the old rule, with the exception that the words "*showing their payment*," are omitted.

The marked distinction thus made must have had an object, and we are of opinion that the true construction of the section implies—

That although, as a general rule, the master should require the actual payment of the sums claimed to be shewn, as the best proof that they have, in the words of the Act, been "in-

curring," he is not precluded from allowing them *although not actually paid*, if he is satisfied by affidavit that they have been necessarily incurred—that the claimant is legally liable for them, and will apply them to the purpose for which they are taxed—and that he has been prevented from paying them only by poverty or some other controlling cause.

We are further of opinion that costs ought not to be allowed for witnesses merely because they have been examined; nor, on the other hand, should the cost of witnesses who have not been sworn be on that account alone refused; but the master should, in the exercise of the discretion which in this particular the law vests in him, allow such and only such costs, as a prudent attorney acting with a becoming attention to the nature of the case and the interests of his client, but with an honest desire also to avoid all unnecessary expense, might reasonably incur.

We have put our opinion in this matter in writing, because it modifies in some degree the previous practice, and because the change may be regarded as perhaps opening a door to abuse against which we desire to guard, by defining as strictly as possible the limits within which the discretion of the taxing officer is in such cases to be confined.

Upon the other exceptions to the master's taxation we are of opinion, that the costs of the declaration and roll, and of the witnesses called to prove a custom, were properly rejected, the former because the rule, giving in exceptional cases, full costs in a summary suit, is intended to place such trials only in the same and not in a better position than plenary suits in which costs are never allowed for work not done, and the latter, because the plaintiff failed in the issue to which these charges are exclusively applicable, although the rule is otherwise where witnesses are called to establish two or more issues, in one of which the plaintiff succeeds, as appears to have been the case with the witnesses whose costs have been objected to by Mr. Pinsent, that the allowance of the brief fee was not, under the facts, admitted at the bar an extreme exercise of the Master's discretion, that the costs of the motion for full costs were costs in the cause (27 Vic, cap. 12, sec. 5) and that the costs of the second affidavit made to supply a defect in the first, should have been disallowed.

We allow costs of this application to neither party.

1867, *July*. HON. MR. JUSTICE ROBINSON.

*Master and Servant—Planter—Servants' wages—21 Vic., cap. 9, sec. 5—  
Application of.*

A planter instructed his supplying merchant to pay his servant the balance of his wages. This was done partly by cash and the balance by an order for goods on the merchant's store, the servant giving a receipt in full. The servant mislaid the order, and the merchant refused payment till production or until a month had elapsed to enable the order to be found. The servant sued the merchant for the balance due on the order, and it was contended that he was entitled to be paid in cash by virtue of 21 Vic., cap. 9, and that the refusal to deliver the goods without the order was a breach of contract.

*Held*—The provisions of 21 Vic., cap. 9, only apply to masters and servants, and not to third parties who are not privy to the original contract. There was no breach of contract in refusing the goods without production of the order or proof of destruction. Either was a condition precedent to obtaining the goods.

THIS case was tried summarily before me on yesterday, and although the amount at issue is only £6 5s., some questions are involved which are of general importance to supplying merchants as well as to fishing servants.

The facts are few.

The defendant supplied a planter named Whelan; he was the master of Grace, the plaintiff.

On 31st October Whelan requested the defendants to pay Grace his wages; they adjusted Grace's account, ascertained the balance, offered to pay him partly in cash and partly in goods. Grace without demur accepted their offer, whereupon they gave him £6 in cash and an order on the shop or store for goods to the value of £7 16s. 5d.; they delivered to him, with the order, his account closed, and took from him a receipt in full of all demands.

On the same day Grace got goods to the value of £1 11s., which was endorsed on the order, and he again took away the order.

On Monday, 4th November, he came to defendants' clerk, Mr. Syme, and told him that he had mislaid the order, whereupon notice was immediately given in the presence of plaintiff to stop the order if it should be presented to any person in the defendants' establishment.

The order merely contained "P. Grace—goods, £7 16s. 5d.", with the name of the firm. There were no words to make it negotiable, and no evidence was given as to any usage that it was negotiable.

On 5th November plaintiff demanded goods to the amount remaining due on the order, which the defendant, through their clerk, refused to give without production of the order, at any rate until the lapse of a month—during which time the order would probably turn up, if at all, and at the end of that time the clerk said he would endeavour to procure for the plaintiff another order, adding, that any man who found the order might easily personate Grace and get the goods on presentation of the order.

Plaintiff issued his writ on the 6th November. About four days afterwards the order did turn up; it was brought to the defendants by Mr. Godden and delivered over to them—they immediately notified the plaintiff's attorney of the fact, and offered to give Grace the goods remaining, which the attorney refused unless the costs were paid.

The only cause of action declared upon is "for balance of account, £6 5s.", and when the plaintiff produced his account it appeared to be closed with no balance whatever on its face.

Mr. Archibald Emerson, for the plaintiff, contended that the goods undelivered constituted a balance for £6 5s., which the defendants should have satisfied on demand without the plaintiff producing the order, and, moreover, he urged that the defendants were bound to pay that amount, not in goods, but in cash, because by the 21st Vic., cap. 9, sec. 5, it is enacted "that the balance of wages shall be paid in cash, any contract or agreement to the contrary."

This is entitled "An Act to regulate the performance of contracts between Masters and Servants," and I am of opinion that it is only to those two classes its provisions apply; I do not think they extend, or were intended to extend, to third persons who were no parties to the original contract; nor to the supplying merchant, where the servant enters into a subsequent agreement with him for a distinct consideration to accept payment in any particular manner or time specially agreed upon.

It is true that in the event of the insolvency of the master the produce of the voyage in the hands of the receiver may be made to respond to the demand for wages, but a limited claim upon property is a different thing from a legal claim upon a person. If it were the law that a fishing servant would not be bound by an agreement he should make with a merchant to accept an immediate settlement of his wages in any particular mode agreed upon, it would be especially prejudicial to the servants, for then there would be small inducement to the receiver

of the voyage to satisfy the claims of servants who would be remitted to the dilatory and expensive process of first establishing the insolvency of the master before he could claim upon the produce of the voyage in the hands of the receiver. I consider that Mr. Emerson's position, in regard to this part of his case, is untenable.

He next contended that the refusal of the defendants to deliver the goods without the production of the order was a breach of contract for which *damages* would be recoverable, and that such damages might be measured by the value of the goods. I cannot think that such refusal constituted any breach of contract; from the testimony it is plain that the production of the order—or clear evidence of its destruction—is a condition precedent to obtaining the goods, and that neither express or implied was there any contract to deliver the goods otherwise.

At the trial I thought it possible that if the plaintiff had declared in trover for the conversion of the order he might be entitled to a stay of proceedings and costs upon the defendants delivering up the order, but a little reflection satisfied me that a count in trover could not be sustained, because the defendants had not the order in their possession when the action was commenced, nor for several days afterwards, and, therefore, could not have been guilty of conversion.

From the best consideration I have been able to give the case I think that in law the plaintiff has failed to establish any cause of action against the defendants, and in strictness the defendants are entitled to judgment; but as a certain latitude seems to have been intrusted to me by both parties, and as the defendants' counsel has repeatedly stated in open court that the defendants are and have been ready to hand the plaintiff his order and at once supply the goods pursuant to it without requiring any costs from him, I am willing to forbear giving any judgment and to direct that the order em-pounded in court be delivered over to the plaintiff.

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1867, *July*. HON. MR. JUSTICE ROBINSON.

*Insolvency—25 Vic., cap. 7—Fraud—Undue preference.*

The penal provisions of the Insolvency Act ought not to be applied when the culpability of the Act and of the intent is open to a reasonable doubt.

I have no doubt that this petitioner is unable to pay 20s. in the pound, and is entitled to be declared insolvent, and I accordingly order him to be so declared.

Mr. Hogsett, on behalf of the adx. of Marshall, submits that the insolvent has rendered himself liable to imprisonment for fraud, under 7th sec. of 25 Vic., cap. 7, for having, "with a view of fraudulently giving an undue preference," conveyed a part of his property to some of his creditors, "with the intent of diminishing the sum to be divided amongst his creditors"; and the particular transactions complained of are,—

- 1st. Giving three qtls. fish in part payment of a debt, to one Bedelle, this summer.
- 2nd.—Conveying his boat, by sale, two years ago, to Mr. Inkpen.
- 3rd. Giving £9 worth of fish, this year, to Mr. Inkpen, for supplies, when he should have given that fish to Messrs. Falle for antecedent supplies.

The provisions of this section are wise and wholesome, and should be enforced wherever the circumstances warrant their application; but it must be remembered that they are penal, and ought not to be applied where the culpability of the act and of the intent is open to a reasonable doubt, for no man should be convicted of a crime except upon clear evidence of guilt.

It appears from the only evidence in the cause, viz., the examination of the insolvent, that the whole of his creditors, except Bedelle and Inkpen, were for fishery supplies of ancient standing, ranging for the most part over seven and eight years, and that during the last two years he had no regular supplying merchant.

It cannot be denied that when supplies for the fishery thus fall into arrear and the merchant declines to continue dealings, the debt is usually considered desperate, and when no legal steps are taken for many years for its recovery, the dealer is induced to believe that he is warranted in providing for the supply of his present wants rather than for the payment of debts long past and apparently abandoned. I do not say that a debtor is not morally bound to pay all his debts, however old,

but the practice referred to reflects materially upon the criminal intent charged in the present case, for which purpose alone I am considering it.

Bedelle's debt was contracted two years ago. The insolvent owes him £12, and I cannot say that the delivery to him of three qtls. of fish in part payment, was what the law considers a fraudulent and undue preference.

As regards the sale of the boat to Inkpen, it appears that four years ago Inkpen supplied the insolvent with the means of building this boat; that there was an understanding, though no precise agreement was then concluded, that the boat should become the property of the insolvent only when he should pay for it; that in two years he had failed to do so, and accordingly he transferred his interest in her to Inkpen, from whom he has since hired her year by year.

The *bona fides* of Inkpen's debt and of this transaction is not impeached by evidence, and without offering any opinion upon the title to the boat, about which I learn an action is pending, I must say that I am far from considering that under the circumstances the insolvent acted fraudulently in carrying into effect the understanding between him and his supplier, on the faith of which he probably obtained the supplies to build the boat.

3rd—The fish delivered this year to Inkpen appears to have been for necessaries supplied by him to the insolvent last spring. I think there is force in the observation of Mr. Prowse, that the law would now entitle Inkpen to a preferable payment for his current supplies, and that fact, coupled with all the circumstances of the case, leads my mind to the conclusion that this act of the petitioner in doing voluntarily, what in no case of insolvency, the law would order to be done, is not one which ought to affix upon him the stigma and punishment of fraud.

One circumstance has occasioned me a little difficulty; the expenditure by the insolvent, during the present year, of the value of eighty or ninety qtls. of fish in the support of his family whilst he was so deeply immersed in debt, struck me as a profuse outlay for a man in his position; but I must not forget that such extravagance is the natural offspring of that pestilent credit system in which the fishermen of the country have, unhappily for themselves and their merchants, been nurtured. It would be unjust to make this man the scapegoat of a system which, however deplorable, is general; and moreover, the point was not raised against him, probably because he is known to have a large family to support.

On the whole I refuse Mr. Hogsett's application to punish the insolvent, but I think that Mr. Hogsett was warranted in resisting the petitioner's application in the first instance, by the fact that the boat was not on the schedule whilst he was apparently the owner of it, having built and always used it, and not having registered any transfer of it. I will, therefore, allow Mr. Hogsett his costs for resisting the petitioner's application.

Let the petitioner be declared insolvent, and Dr. Moran be appointed the trustee of his estate.

*Mr. Hogsett* for creditors.

*Mr. Prouse* for insolvent.

## HANN v. TOBIN.

1867, July. HON. MR. JUSTICE ROBINSON.

### *Insolvency—Fraud.*

Upon the examination of the insolvent it was apparent that several fraudulent acts had been committed by him, notwithstanding which the court suggested the advisability of making a compromise with his creditors, which he having failed to effect, sentenced him to imprisonment under the penal provisions of the Insolvency Act.

THE defendant admitted plaintiff's demand for £82, for which judgment was accordingly given; the defendant, who was arrested and in prison, filed a petition to be declared insolvent. Mr. Hogsett objected to proceeding with the investigation then and there, but offered on behalf of the plaintiff to accept a present payment of £10, and to be given several years to pay the balance by instalments. This the defendant refused and insisted upon being declared insolvent.

The court determined that as all the creditors of the petitioner were then before the court there was no reason for not hearing the petition, and the defendant was accordingly examined as to his insolvency.

On his examination he admitted that he had sold lately at St. Peter's a large boat for £60, which he had agreed in writing to deliver to the plaintiff; that he had appropriated the proceeds to his own use; that he had, since he had left plaintiff last summer, taken up supplies to the amount of £50 from

another supplier, and had paid for them, and had also a winter fishery and a balance for his last summer's fishery, but had paid nothing to the plaintiff either out of those resources or out of the money he had obtained at St. Peter's for his boat, and refused to pay any now.

His Honor suggested to Mr. Kough that it would be wise for the defendant to make a compromise with the plaintiff, and for that purpose he and the plaintiff had better retire for a few minutes before a judgment was demanded. They accordingly retired, but the defendant would not comply with the terms the plaintiff had offered, and Mr. Hogsett required the decision of the court upon the insolvent's application.

The court declared the petitioner insolvent; appointed W. Hann his trustee, and sentenced the insolvent, for fraudulent conduct, to six months' imprisonment in St. John's gaol.

*Mr. Hogsett* for plaintiff.

*Mr. Kough* for defendant.

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### INKPEN v. STEVENSON, SHERIFF.

1867, *December*. HON. MR. JUSTICE ROBINSON.

*Trover—Fishing craft—Ownership—Possession.*

In order to succeed in an action of trover the plaintiff must have the immediate right of possession in the article wrongfully converted.

ACTION brought to recover damages for the wrongful seizure and conversion by the defendant, as sheriff, of a fishing boat, claimed by the plaintiff as his property.

The plaintiff was examined, who gave evidence touching the ownership, but he stated that at the time the boat was seized by the sheriff on account against one John Collins, jr., she was in possession of Collins by virtue of a hiring for one year, which would not expire for several months; whereupon His Lordship suggested to the plaintiff that such evidence was fatal to his recovery in this action, which required that the plaintiff should have the immediate right of possession to the article wrongfully converted; but both parties being anxious for the decision of the court upon the title to the boat, the case went on upon an

arrangement as to each party paying his own costs. It appeared that the boat had been built with supplies furnished by Inkpen, and on the understanding that she was only to become the property of Collins when he should pay for her; he, not having paid for the boat, assigned her to Inkpen in consideration of £55, who took possession of her and kept her for a short time, and then, year by year, leased her to Collins for an annual payment. This assignment was not registered, and its validity was on that account impeached; but it was held by the court that the provisions of the Registration Act, which required assignments of chattels of the value of "fifty pounds," and where the possession continued in the vendor, did not apply to the present case, because "fifty pounds" meant by law fifty pounds sterling, and the possession of the vendor under a distinct charter from the vendee was not such a continuing possession in the vendor as the law contemplated.

*Mr. Prowse* for plaintiff.

*Mr. Hogsett* for defendant.

### MCBRIDE ET AL v. COLLINS.

1868, *July*. HON. MR. JUSTICE ROBINSON.

*Mortgage—Interest—Dealing account—Foreclosure Mortgage silent as to interest—Obligation of mortgagee in possession.*

A planter, to increase the security of a merchant, for advances for the fishery, gave him a mortgage on his land. In an action seeking a foreclosure, the merchant claimed interest under the mortgage though the instrument contained no covenant for interest.

*Held*—No interest was chargeable. The mortgage was given to secure the balance of a planter's account. Such balances, unless by express agreement, carry no interest. Mortgages follow the nature of the debt.

THE complainants seek a foreclosure of a mortgage. The defendant denies that there is any amount due, alleging that the mortgage bears no interest, and that the complainants being mortgagees in possession had, or should have received rent more than sufficient to discharge the principal debt.

The first question to be decided is, does the mortgage debt bear interest?

None is reserved, or referred to in the deed, and silence upon the subject in an instrument prepared by an experienced conveyancer, is nearly conclusive that no interest was intended to be exacted or paid.

The debt for which the security was given was the balance of a dealing account between merchant and planter. Such balances do not carry interest except by express agreement.

The mortgage was given to increase the creditor's security by the pledge of the debtor's land; and as mortgages follow the nature of the debt, (*Story*, 254) such debt and its legal incidents are not thereby in the slightest degree varied.—*Cloices vs. Waters*, 12 E. C. L. & E. R.

The mere fact of the instrument being under seal does not increase the legal responsibility of the debtor as regards interest.—*Fisher*, 509.

We are therefore all of opinion that interest is not chargeable.

After the Mortgage was given subsequent dealings continued between the complainant and defendant, and the creditors had a legal right to appropriate subsequent payments to the discharge of subsequent liabilities—they are only bound to place to the credit of the mortgage such sums as by the agreement of the parties were to go in liquidation of it.

We think that the evidence establishes the fact, that the complainants were and are mortgagees in possession, and in 1861 let the property to a tenant who is still the occupant, at an annual rent of £12 10s. These facts cast upon the complainants the responsibility of relieving themselves from being charged with the rent which the said tenant undertook to pay, for a mortgagee in possession is required to be diligent in realizing the amount due on the mortgage, that the estate may be restored, and is liable to account for the rents and profits during his possession.—*Fisher*, 482, 492; *Blacklock v. Barnes*, Sel. C. C. 53.

He is always charged with the utmost value they are proved to be worth.—*Trimleston v. Hamilton*, 1 B. & B., 385. He is bound to act as a provident owner, and to recover what such an owner would, with reasonable diligence, have recovered.—*Williams v. Price*; *Hughes v. Williams*, 12 Ves.

Subject to this statement of the law let it be referred to the master to take an account of the amount remaining due for principal on the said mortgage, charging the complainants in the first instance with the rents and profits actually received,

and also with £12 10s. a year from 1861, and leaving them to reduce that amount by shewing sufficient excuse for not having received such rents, either by the interference of the Mortgagor, by the inability of the defendant to pay, or otherwise. And let the master report accordingly, for further directions.

# WADDEN v. GENERAL WATER CO.

1868, *July*. HOYLES, C. J.; ROBINSON, J.; EMERSON, J.

*Pleadings—Declaration—Sufficient ground of action—Demurrer—Water Company Acts—Right of property Owners to use of water during the happening of a fire—Withholding by company—Liability of company.*

The owner of certain dwelling houses in the town of St. John's sought to recover from the General Water Company the value of houses destroyed by fire, on the grounds that their loss was occasioned by the company depriving him of the use of the company's water during the happening of the fire. The declaration was demurred to on the ground that it disclosed no legal liability.

*Held—*(Overruling the demurrer)—The Fire Brigade, under 26th Vic., cap. 9, at the time of the happening of a fire, have the control of the water supplied to the town of St. John's by the Water Company vested in them and not the Water Company

The Water Company Acts do not expressly confer the right to the owners of property to the use of the water supplied to the town of St. John's by the Water Company during the happening of a fire, but, in conjunction with the Fire Brigade Act, they give it inferentially.

IN this cause the plaintiff sought to recover from the defendants the value of certain dwelling houses destroyed by fire occurring within the town of St. John's on the 17th of July, A. D. 1866, on the ground that their loss was occasioned by the default or wrongful act of the defendants in depriving the plaintiff at the time of the fire of the use of the company's water.

The declaration was as follows: —

ST. JOHN'S, S. S.:

John Wadden, by George J. Hogsett, his attorney, complains of the General Water Company, for that the said plaintiff being owner of certain dwelling houses situate within the town of St. John's aforesaid, and being a rate payer to the said com-

pany before and at the time of the committing the said grievances by the defendants hereinafter mentioned, was and still is as by law prescribed entitled to the use on occasions of fire and for other purposes of the water supplied the town of St. John's, and by reason thereof, before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have had and enjoyed and still ought to have and enjoy the benefit and advantage of the said water for the purposes aforesaid. Yet the said defendants, having the control and management of the said water and water pipes, mains, fountains and hydrants through which the said water was and still is conveyed, well knowing the premises but contriving and wrongfully intending to injure the plaintiff in this respect and to deprive him of the use and benefit and advantage of the said water, to wit, on the 17th July, A. D. 1866, on the occasion of a fire which then and there occurred at Riverhead, in St. John's aforesaid, hindered and prevented the said plaintiff from having the use of the said water, and then and there by themselves or their servants, their or either of their neglect, omission, or default, closed and prevented from being opened the water pipes, mains, fountains and hydrants through which the said water then and there ought of right to have run, and which said water pipes, mains, fountains, hydrants and water were then and still are under the control of the defendants as aforesaid, and the said plaintiff thereby and owing to the carelessness and negligence of the said company in controlling and managing said water pipes, mains, fountains and hydrants as aforesaid, was on the occasion of the said fire deprived of the use of the said water, whereby the said houses of the said plaintiff were wholly destroyed and consumed by the said fire—damages \$4,000.

The defendants demurred to the declaration as shewing no legal liability on their part to answer in damages for the injury complained of.

The demurrer was argued in the early part of the present term by Mr. Pinsent, Q. C., for the defendants, and by Messrs. Hogsett and Little for the plaintiff.

Mr. Pinsent contended that whatever equitable claim the plaintiff might have to the use of the water in case of fire, he had no such legal right to it under the Water Company Acts as to entitle him to an action in the event of its being withheld, unless at least he had paid rates for the houses in question, which did not certainly appear; that the defendants being

a corporation could not be held liable for a wilful wrong of the character complained of, and that, as they managed the works not for their own profit but for the benefit of the public generally, and as it was not shewn that at the time of the fire the water was available or had not been stopped for some sufficient reason, they could not, under the meagre and insufficient statements of which the declaration consisted, be held responsible in manner and to the extent therein charged.—*Harris & Baker, 4 M. & S. ; Rex vs. Burgesses, of Lyme 5 Bing ; Parmely vs. Lau. Canal Co. ; 11 Ad. & Ellis Metcalfe and Hetherington, 11 Ex. Green and London G. O. Company, 7 C. B., N. S.*

Messrs. Hogsett and Little, on the other hand, maintained that the plaintiff had an undoubted right to the use of the water as claimed in the declaration, and that as the defendants were therein shown with sufficient certainty and clearness to have been guilty, as well of an active wrong to the plaintiff as of neglect in the management of the works, which were, it was contended, under the control of the company at the time of the fire, they were liable in damages for the injury sustained by the plaintiff, it being the natural consequence of their wrongful acts and defaults.

On the last day of term the court delivered judgment as follows:—

The Chief Justice said the only question for determination was, whether in the terms of the second section of the Pleading Act the declaration set forth a sufficient ground of action without regard to any defect of form, if it did the demurrer must be overruled.

The plaintiff appeared by his pleadings to rest his claim for compensation on two grounds; first, that the defendants *having at the time of the fire the control and management of the water and water works had, by the neglect, omission or default of themselves or their servants* in the management of the works, prevented the plaintiff from having the use of the water, and thus occasioned the loss, the subject of the action

It would be found, however, on reference to the Acts relied on, that at the time of a fire the defendants had not by law any control whatever over the water, such control being on such occasions vested by the 26th Vic, cap. 9, in the Fire Brigade; no public duty, therefore, rested upon them at such times so to manage the works as, if possible, to extinguish the fire, and they, consequently, would not be liable to an action for not doing that which they were not in law bound to do.

Moreover, if the defendants had by law control of the water in case of fire, it should have been averred (which it was not) that they had notice or were aware of the existence of the fire, as they could not justly be held liable for neglecting a duty of the necessity for discharging which they were, as far as appeared, innocently ignorant.

As regards this assumed ground of action, therefore, the declaration was clearly insufficient.

Different considerations, however, applied to the second ground of action, which substantially appeared to be stated thus:—

The plaintiff, being the owner of certain dwelling houses in the town of St. John's, was entitled by law to the use of the water for their protection on occasions of fire; but the defendants, regardless of the plaintiff's rights, wrongfully and with intent to injure him on the occasion of a fire which occurred in the town on the 17th July, A. D. 1866, closed the water pipes and prevented them from being opened, and hindered and prevented the plaintiff from having the use of the water; in consequence thereof his houses were then consumed.

He was of opinion that although the Water Company Acts did not in express terms confer the right to the use of the water for which the plaintiff contended, they, in connection with the Fire Brigade certainly gave it to him inferentially, and, if so, this statement of the second ground of action was sufficient as containing all that in law was necessary to maintain the action, namely, the wrongful invasion by the defendants of the plaintiff's legal rights, and damage arising to the plaintiff in consequence.

To this extent, therefore, the declaration could be upheld.

ROBINSON, J, concurred in the judgment for the plaintiff delivered by the Chief Justice, and added that upon the argument he had inclined to the opinion that none who did not contribute to the support of the company could claim as of right the use of their water and works, and he leaned towards that view from the fact that not in one of the many Acts upon the subject was it expressly declared that the supply of water for the *extinguishment of fire* was amongst the objects sought to be attained by the establishment of the company. Moreover, the levy for rates being limited to property within 300 yards of the water pipe, seemed to imply that the Legislature deemed that distance the extreme point to which benefit could be derived from the water, and the owners of property situated

beyond that limit being relieved from the responsibility should be deprived of the reciprocal privilege; but a careful examination of the various Acts had satisfied his mind that the general policy and intention of the Legislature were, to give to all persons within the town of St. John's, a legal right—in case of fire—to use the water of the company in a necessary and reasonable manner for the suppression of such fire, and that such intention was expressed with sufficient clearness notwithstanding the absence of express terms. The plaintiff, therefore, had this right, and having averred in his declaration that he possessed it, and was wrongfully prevented by the defendant from exercising it, he had disclosed a sufficient cause of action to render a general demurrer to such declaration untenable.

He had some doubts as to the propriety of overruling the demurrer with costs, because much of the declaration was so informal and substantially defective that the defendants would have had difficulty on proceeding to trial without excepting to it, but the 4th section of the Pleading Act had provided a remedy of which they might have availed themselves, but have not, and as they have demurred to the whole declaration when a part is good, their demurrer must be overruled upon the usual terms.

EMERSON, J., concurring in the opinions expressed by the other judges as to the sufficiency of the declaration so far as it charged an active wrong by the defendants to the plaintiff.

The demurrer was overruled.

*Mr. Hogsett and Mr. Little* for plaintiff.

*Attorney General and Mr. Pinsent, Q.C.* for defendants.

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1868, *July*. HON. MR. JUSTICE ROBINSON.*Partnership, Articles of—Will—Capital left in concern—Insolvency—Debt—Proof.*

The testator, who was a member of a co-partnership, died in the year A.D. 1862. By his will he desired that all his monies embarked in the partnership concern at his death, should remain in the same, his remaining partners paying interest at the rate of five per cent. per annum, the interest to be paid annually to his legatees in the same proportion as their legacies, the principal sum going to the legatees (his daughters) at the end of five years. After his death his executors estimated the monies so left in the business at £28,478 8s. 3d., and interest on this sum was regularly paid by the surviving partners up to the year 1867, when the firm became insolvent. The executor of the testator claimed to prove on the insolvent estate for the whole of the above amount as an ordinary creditor. The general creditors resisted this on the grounds that the monies were kept in the business for the benefit of the legatees and that they were not entitled to any portion of the fund until the general creditors were paid in full. On a special case stated for the opinion of the Court,

*Held*—The executors were entitled to prove for the whole amount and the legatees are creditors of the estate for their portion of the same and entitled to a rateable dividend on the nett assets of the estate.

## (SPECIAL CASE).

THE said insolvents filed their petition and schedule to be declared insolvent on the 31st day of May, A. D. 1867, (exhibit A 3); thereupon the orders (exhibits A 4 and A 6) were made.

The trustee, Henry K. Dickinson, proceeded to realise the insolvents' estate.

The rule of reference (exhibit A 7) was made to the master, T. J. Kough, Esquire, on the 6th day of February, A. D. 1868. The master took the evidence hereto annexed.

The exhibit A is a copy of the will of the late Kenneth McLea, late of St. John's, merchant, which has been duly proved.

The exhibit marked A 9 is the articles of co-partnership between the said insolvents.

The executors of the will of the late Kenneth McLea claim to be paid £28,478 8s. 3d., and interest thereon from the 31st day of December, A. D. 1866, up to the declaration of insolvency, or Elizabeth J. Walbank, Jeanie C. Prowse and Catherine H. MacRae, legatees named in the said will, claim to be paid the following amounts, with interest thereon, from the 31st day of December, A. D. 1866, up to the declaration of insolvency, namely, Elizabeth J. Walbank, £4,746 8s.; Jeanie

C. Prowse, £4,746 8s. and Catherine H. MacRae, £4,632 4s. 7d., preferentially, or *pari passu*, with the other creditors of the insolvents.

But the Royal Bank of Scotland, Robert Alsop, N. Stabb & Sons, and Clift, Wood & Co., for themselves and other creditors of the insolvents, contend that the executors or legatees have not rights to claim on this estate, if at all, until the claims of general creditors be first satisfied; that neither under the terms of the will nor from the circumstances disclosed in connection therewith and the trade of Kenneth McLea & Sons, can such claims be entertained; that even if so entitled the amount of claim has not been sufficiently and correctly ascertained; that the said claimants are liable as partners to general creditors.

The decision of the court is prayed as to the right of the executors or legatees to claim as aforesaid, and amount, and as regards their liability as aforesaid, and that all necessary directions, particular and general, be made as regards the ascertainment of claims of any creditor or creditors, and distribution of the said estate, and otherwise concerning the same, saving all right of appeal to parties.

The court shall be at liberty to direct inquiry into any matter or circumstance upon which they think proper to be informed before giving judgment on this case.

(Signed), F. B. T. CARTER,  
*Counsel and Attorney for several creditors and trustee.*

(Signed), W. V. WHITEWAY,  
*Counsel and Attorney for executors and legatee MacRae.*

(Signed), ROBERT J. PINSENT,  
*Counsel and At'y for executors and legatee Eliza. J. Walbank.*

This matter comes before us upon a special case stated by the trustee of the said insolvent estate, and by the executors and legatees of Kenneth McLea, deceased, and by several creditors of the said insolvents, for the purpose of obtaining the directions of the court as to the proper distribution of the assets of the insolvency.

Kenneth McLea was the father of the insolvents, and the head of the firm in which he and they had traded up to his death, under the title "Kenneth McLea & Sons."

He died in June, 1862, leaving his business apparently prosperous, and having disposed of his property by a will, copy of which is as follows:—

[COPY].

THE LAST WILL AND TESTAMENT OF KENNETH MCLEA, of St. John's, in the Island of Newfoundland, merchant. I hereby revoke all former wills and codicils by me made, and appoint John Brine McLea, of St. John's aforesaid, merchant, Matthew William Walbank, of the same place, barrister-at-law, and Thomas R. Smith, also of St. John's, merchant, to be the executors of this my last will.

*First*—It is my will and desire that all the monies which I shall have embarked in the trade carried on by myself and sons as merchants under the style of "Kenneth McLea & Sons," shall remain in the hands of my surviving partners for a period not exceeding five years next after my decease, subject to the payment of interest for the same at the rate of five pounds per centum per annum, payable by my said partners yearly and every year until my capital shall have been paid to my said executors; provided always, that if my said partners shall feel disposed to pay the same or any part thereof at any time before the expiration of the said period, they shall be at liberty so to do, and I desire that the interest arising out of my said capital, invested as aforesaid, shall be equally divided amongst all my children annually, share and share alike.

*Secondly*—It is my will and desire that so soon as my said executors shall have realized my said capital so invested as aforesaid, they hold the same upon the following trusts, viz. :—*in trust* to divide the same, share and share alike, amongst my said executor John B. McLea, and his brothers James S. McLea and Robert P. McLea, and his sisters Elizabeth Jane, Jeanie Catherine and Catherine Harriet, and in case of the predecease of any or either of them, leaving lawful issue, the share of such child or children shall go to his, her, or their issue in equal proportions, and that the foregoing bequests to my daughters above-named shall be held by them independent of any present or future husband or husbands, and not subject to his or their debts or control.

*Thirdly*—I give, devise and bequeath unto my said executors all the profits and monies which shall accrue to me out of and arising from the said trade from and after the first day of January last and up to the time of my decease, or a sum equal thereto, *upon trust*, to divide the same between my said daughters, share and share alike, and in case of the predecease of any of them, leaving lawful issue, the share or shares of such deceased daughter or daughters to be divided equally amongst her or their issue; and I will that my said daughters hold the last-mentioned legacy independent of any present or future husband or husbands, and not subject to his or their debts or control.

*Fourthly*—I give, devise and bequeath to my mother-in-law, Mrs. Elizabeth Brine, the annual sum of fifty pounds, to be paid her in each and every year during her natural life.

*Lastly*—All the rest and residue of my estate and effects, of whatever nature or kind soever and wheresoever situate, I give unto my said executors *upon trust* to divide amongst my executor, John B. McLea, and his said brothers and sisters, share and share alike, the sisters to hold their

shares independent of any present or future husband, and not to be subject to his or their debts, liabilities or control; and in case of the predecease of any of my said children, leaving lawful issue, then the share of such child or children to be paid to his, her or their issue, in equal proportions.

*In witness* whereof I have hereunto set my hand and seal, at St. John's, aforesaid, this eleventh day of June, A. D. one thousand eight hundred and sixty-one.

KEN. McLEA. [Seal].

Signed, sealed, published and declared by the testator, Kenneth McLea, as and for his last will and testament, in the presence of us, who in his presence at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

ANGUS McINNES.  
THOS. WINSBORROW.

Shortly after the death of the testator his executors, Walbank (who is also the husband of one of the daughters) and John McLea, with the co-operation and assent of Robert Prowse, the husband of another daughter, examined and estimated the monies and other capital of the testator referred to in the first clause of his will, and agreed upon the sum of £28,478 8s. 3d., currency, as their value, and upon this amount interest was regularly paid by the insolvents up to December, 1866.

The three sons continued the business under the same title from the death of their father until they became insolvent in June, 1867, having availed themselves of the provisions in the first clause of the will.

In the distribution of the realized assets of their estate a difficulty has arisen between the executors on behalf of the female legatees on the one part, and the general creditors on the other, respecting the right of such legatees to rank at all as creditors, which question the trustee submits for our determination.

The proper solution of the difficulty depends upon the correct interpretation of McLea's will. If the monies and capital referred to in the first clause were continued in the trade of the surviving partners for the benefit of the female legatees, and if these were entitled to a share in all profits, then they will be responsible for all losses and will have no legal claim to any portion of that fund until the general creditors shall have been paid in full. But if such monies and capital were merely invested as a loan to the surviving partners on which a fixed interest only was payable to such female legatees, irre-

spective of profits or losses in trade, then such legatees will be in the same category with any other persons who may have lent money or sold merchandize to such partners, and will be entitled to rank rateably as creditors.

It is to be observed that nowhere does the testator direct his executors embark in, or carry on the trade, nor does he empower them to interfere in its management, nor have they done so, they can only be responsible if at all, as partners, by legal inference from the words used in the will.

The amount at stake, and the importance of the question involved, would have occasioned me anxious consideration if the case had been one *primæ impressionis*, but happily the principles by which our judgment should be governed were in 1862 carefully investigated and settled in England, by the Court of Appeal in Chancery, in the cause "Beater and others vs. the Rev. Arthur Brooking and others, executors of James Coster, 8 Jurist."

The main features of that case are so similar to those arising in this, that the very language used by Lord Justice Knight Bruce and by Lord Justice Turner in delivering their judgment is the most appropriate that I can employ in disposing of this matter.

Rejecting minor details it is sufficient to state that James Coster was the principal partner in his firm. He died leaving his trade prosperous and some of his relatives partners in it, *in esse* as well as *in posse*. By his will he disposed of all his property, but he was desirous that the business with which he had been so long connected should be favored, and being unwilling that his large capital should be suddenly withdrawn from it, he directed that a £100,000 of it should for a certain period be continued in his firm and be considered "part of the partnership effects," repayable to his executors with interest in prescribed annual instalments.

After James Coster's death some of the instalments and interest were duly paid, but before the whole of the said sum was refunded to the executors the firm became bankrupt.

There, as here, the executors on behalf of the legatees, claimed to rank as creditors on the bankrupt estate for the unpaid balance, and there, as here, such claim was resisted by the general creditors, and upon the same grounds.

It will be noticed that the words in Coster's will, "*and be considered part of the partnership effects*," would seem to support the position taken by the creditors more strongly than the

language employed in McLea's will, but, the Lords Justices, looking at the whole case with its attendant circumstances, determined that under the proper construction of Coster's will the £100,000 should be considered and treated as a loan to the surviving partners, bearing interest but not entitled to profits or further advantages however prosperous the trade might prove; and they ruled that Coster's legatees had a legal status as creditors, and were entitled to claim a rateable dividend of the assets of the bankruptcy on foot of the said £100,000.

It would be difficult to find an authority more exactly in point than that decision, or one determined by judges of more commanding ability. It would be a superfluous expenditure of time to comment upon the principles and precedents on which it is based; we do not find that it has been questioned by appeal, and we all feel that it is a safe and proper guide to direct us in our judgment.

The word "monies" in the first clause of McLea's will was adverted to in argument at the bar. In our opinion it should not be limited to cash; it seems to have been used rather as a synonym for *capital*, which is found lower down in the same clause, and should be understood in the general signification which the term money originally bore as an exchangeable merchandize.—See *Brandé's Encyclopedia*.

The Attorney General, on behalf of the Royal Bank of Scotland, pressed upon us the wrong which, as he alleged, had been done his clients by being entrapped into making advances to the insolvents through misrepresentation of their property, but to that argument we cannot give effect, to the prejudice of innocent parties; correct information was easily accessible to them, through the registry of this court. If such misrepresentations were made, the guilt rested upon the persons committing the offence, and for which doubtless they would merit punishment, but to appropriate the fortunes of the daughters towards making compensation for the faults of the sons, would be simply to multiply the wrong. He also contended that although ordinary death operated as a dissolution of co-partnership, yet that in this case, Kenneth McLea, by leaving his property in the firm, the style of which remained unchanged, intended that such firm should go on in the same manner as before his decease, and that the capital so continued was liable to be taken to pay the debts of the continuing firm. Now we think that the conduct of McLea indicated a contrary intention. By his will he makes a distinction between the "profits"

of his trade whilst he was a partner, viz. : "*up to the time of his decease,*" and the estate which survived him and of which he disposed without reference to any such profits, by directing it to be "invested" (in the hands of his surviving partners, no doubt, but still to be invested) for five years at a fixed interest of five per cent. per annum ; that seems to shew that he understood that his death would have the usual operation as a dissolution of partnership between him and his sons, but should not terminate the kindly feelings he entertained toward them whom he would still favor, by lending them the use of his capital for a limited time longer.

It is true that the testator's property was to be employed in the trade of his sons, still it was to be employed not as the property of the executors, or of his daughters, but as the property of the surviving partners to be used for their benefit, and as they thought fit, and by them to be repaid to the executors at the end of the five years. Surely it would have been strangely inconsistent if an intelligent merchant, as the elder McLea was, after he had cautiously guarded the fortunes of his daughters from the control even of their own husbands, had in the same breath committed those fortunes to the vicissitudes of commerce over which the daughters were not allowed to exercise any supervision, and out of which they were not entitled to receive any profits.

Looking at the language of the whole will and the surrounding circumstances, we are unanimously of opinion that the said capital of Kenneth McLea, to the value of £28,478 8s. 3d. cy., was vested in the insolvents as a loan to them, and that the daughters of the testator are creditors of the insolvent estate for their portion of the same, and entitled to a rateable dividend of the nett assets, and the trustee is, accordingly, authorized and directed to declare such dividend.

A suggestion was made in argument that the valuation of the property left with the surviving partners was excessive ; there is no evidence to support that proposition, the contrary rather appears ; the valuation was made by those who had conflicting interests, and were mutually alive to the necessity of forming a fair estimate, it was made before any difficulty had arisen, and Robert Prowse in his evidence deposes that the value was underrated rather than overrated.

As regards the costs of these proceedings, we feel that the matters at issue are of considerable importance to all concerned, we have derived substantial assistance from the research and

arguments of the gentlemen of the bar, and we feel that it is equitable and proper to order the taxed costs of all parties who have appeared before us to be paid by the trustee out of the general estate.

*Hon. Attorney General (F. B. T. Carter)* for trustee and several creditors.

*Hon. Mr. Whiteway, Q.C.*, for executors and legatee McLea.

*Mr. Pinsent, Q.C.*, for executors and legatee E. J. Walbank.

WALBANK, TRUSTEE OF INSOLVENT ESTATE OF CHANCEY  
AND HEATH *v.* SAMUEL KNIGHT.

1868, *July*. HON. SIR H. HOYLES, C. J.

*Landlord and tenant—Right of landlord to distrain on chattels of tenant on premises after declaration of insolvency—25th Vic , cap. 7.*

On the 11th day of March the insolvents filed their petition for insolvency, and on the 22nd of the same month were declared insolvent and their property vested in a trustee. On the 29th of the same month the landlord of insolvents distrained on the chattels on the premises of the insolvents for one half year's rent due on the 31st of the previous October. At the time of the distraint the trustee in insolvency had removed part and was removing the residue of the said chattels.

On a case stated for the opinion of the Court—

*Held*—A landlord who distrains subsequent to the issuing of the order vesting the insolvent's estate in trustees, acquires no title to the goods so distrained.

In this cause, which was an action of replevin, the subject for the consideration and judgment of the court is set out in the following case:—

IN THE SUPREME COURT.

MATTHEW W. WALBANK, <i>Trustee of the Insolvent Estate</i>	}
of L. T. CHANCEY and J. P. HEATH, <i>plaintiff</i> ,	
<i>vs.</i>	
SAMUEL KNIGHT, <i>Defendant</i> .	

The following case is stated for the opinion of the court, under a rule of court dated the 15th day of June, A. D. 1868:

The said Chancey and Heath filed their petitions to be declared insolvent on the 11th day of March. A. D. 1867, with a schedule of assets and liabilities annexed thereto, whereupon an order was made, copy of which is annexed marked A, and which order was published in the *Royal Gazette* of the 12th day of March in the said year, and also in the *Daily News* of the following day. On the 22nd day of the same month the said Chancey and Heath, in pursuance of said order A, were duly declared insolvent.

The defendant, on the 29th day of March, A. D. 1867, distrained the chattels mentioned in exhibit C, hereto annexed, the said goods and chattels then forming part of the assets mentioned in the said schedule, and then being in the shop and premises of Chancey and Heath, for the sum of sixty dollars due to him for balance of one half-year's rent of the said shop and premises on the last day of October, A. D. 1866. When distraint was made, plaintiff had removed part and was removing the residue of the said goods and chattels.

The plaintiff, on the 3rd day of April then next ensuing, replevied the said chattels.

Question for the opinion of the court:—

Whether the defendant had a right to distrain the chattels and apply the proceeds to the payment of the rent, to the exclusion of the other creditors of the insolvents?

If judgment for the plaintiff, he shall be at liberty to retain proceeds of the sale of said chattels with costs; and if for defendant, the judgment shall be entered as of non-suit with costs

M. W. WALBANK, *C. C. & Registrar.*

F. B. T. CARTER, *Attorney for defendant.*

W. V. WHITEWAY, *Attorney for plaintiff.*

Copy of rule of court referred to in annexed special case and marked A:—

*In the matter of the petition of LIONEL T. CHANCEY and JOHN P. HEATH, lately carrying on business in St. John's as confectioners and bakers, praying to be declared insolvent.*

Upon reading the said petition and the affidavit and schedule thereto annexed, and upon hearing Mr. Whiteway, Q. C., counsel for petitioners, I do appoint Thursday the 21st day of March instant, at eleven o'clock, a. m., in Chambers, at the Court House, St. John's, for the purpose of examination and enquiry as to the solvency or insolvency of the said

petitioners ; and I do hereby appoint Matthew W. Walbank, Esq., trustee of the estate of the said petitioners, in which trustee the said estate is hereby vested.

St. John's, Newfoundland, March the 11th, A. D. 1867.

(Signed),

H. W. HOYLES, *Chief Justice*

Upon motion of Mr. Whiteway, Q. C., }  
for petitioners.

The question here submitted for our determination depends upon the construction to be given to the local Act 25th Vic., cap. 7, entitled "An Act to amend and consolidate the law of insolvency, and for other purposes," whereby provision is made for declaring insolvent persons unable to pay their debts in full, and for vesting their estate and effects in trustees for distribution amongst their creditors.

At the argument Mr. Whiteway, Q. C., for the plaintiff, contended that the landlord's common law right of distraint for rent, securing to him, to the exclusion of other creditors, twenty shillings in the pound out of goods found upon the premises, was taken away by this Act, inasmuch as its provisions (upon which he commented in detail) vested the insolvent's estate in trustees for distribution in a prescribed order, with marked preferences to certain classes of creditors, and were, therefore, altogether inconsistent with the exercise of such a right ; and further, that the rule of the English law permitting a distraint in cases of bankruptcy was inapplicable to the widely different circumstances arising under our insolvency law.

The Attorney General, for the defendant, maintained that the landlord's right of distress could only be taken away by express words, and that none such were to be found in the Insolvency Act.

That this principle had been recognised in England, and had been applied to the provisions of the English bankruptcy and insolvency laws (*1 Atkins, 103-4, Sowerly & Briggs, 11 M. and W. Wood f. L. & T. ; Mont. & Ayr. ; B. L. Buckley & Buckley, 2 T. R., & Philips & Shewill, 6 Q. B.*), and that being capable of application here, it should have effect in the administration of the insolvency law of this country. He referred also to the alleged analogous case of an intestate estate, as to which, although by law to be distributed in a certain order, no question had ever been raised as to its being subject to a distress.

The point now in issue was discussed but not determined in *re Bulger's Insolvency, March Term Sup. Co., 1867*, in which it

was held that a landlord who had distrained *prior* to the issuing of the order vesting the insolvent's estate in trustees, and had thus gained a possessory lien on the property seized, could not be disturbed by the trustees, whose title had accrued *subsequently*.

In the present case the property in the goods had *previously* vested in the trustees, who were actually in possession before the landlord distrained, and the relative position of the parties were thus reversed.

The question has never before, we believe, been fully raised for determination under the present Insolvency Act, and, as it is important as well as novel, we have given it much consideration.

The rule in cases of bankruptcy, relied upon by the Attorney General, depends upon certain cases reported in *1 Atkins, page 103-4*, wherein it was held by Lord Chancellor Hardwicke, anno 1733, that the right of distress was not taken away by the seizure of the tenant's effects under a commission of bankruptcy. No reasons are given for these decisions, and it is now, therefore, impossible to say whether they were governed by that regard for the interests of landlords which, arising out of the feudal system, formerly characterized the laws of England, or were based upon the fact of the assigners in bankruptcy then holding under a compulsory conveyance, and, therefore, under an act of the party and not strictly by operation of law, or upon some other wholly different grounds; but although apparently inconsistent with the spirit of the bankrupt law, which seems to be that of equality amongst all the creditors, they have been too frequently recognized, both by Acts of the Imperial Parliament and by the Courts at Westminster, to be questioned as authorities in the administration of the bankrupt law.

The question for our determination, however is, not what may be their force in England, but whether, as the Attorney General contended, they prescribe a principle of decision by which we should be governed in the administration of the local insolvent law; and we are all of opinion, that there is no such analogy between the English Bankruptcy Act and our Insolvent law, as renders these authorities binding upon us.

The Bankruptcy laws in force at the time of Lord Hardwicke's decisions were, the 34 & 35 H. 8 C. 4; 13 Eliz., c. 7; 4 Anne, c. 17; 7 Geo. I., c. 31, and 5 Geo. II., c. 30.

In none of these Acts do we find any provision for preferable payments, nor any directions as to the order of distribution of bankrupt estates, beyond an incidental direction that the proceeds should be paid rateably amongst the creditors without regard to the difference between specialty and other debts, and looking at the preambles of these Acts, they seem to be directed more to *securing* the estate for the benefit of creditors than to the manner of its distribution.

Our Insolvency Act is of a very different character. Its plain and obvious policy is, not merely to secure the insolvent estate for the payment of his debts, but to regulate its distribution according to a prescribed scale, by which certain classes of creditors are expressly given a preference before all others; and to this object several sections are devoted, framed with an elaborate care, which plainly shows the intention of the Legislature, that nothing should interfere with or override the claims of those who are thus favored.

Thus the 19th, 20th and 21st sections give to seamen and fishermen, upon a certain description of property, a preference before all other creditors, and in terms which render it doubtful whether even in case of a distraint levied before the insolvency, the landlord might not himself become liable for their wages, a conclusion, of course, inconsistent with the idea of a prior claim on his part.

The 22nd section gives a special preference on the general estate to *all* clerks and servants.

The 23rd section provides for the payment of Crown debts *after clerks and servants*; whence it appears that the Crown, although not bound by the Bankruptcy Acts, is expressly bound by our Insolvency Law.—*Chitty, Prerog.* 286; and it would seem to follow that in cases of insolvency, if the right of distress exists the rights of the Crown are postponed to those of the landlord, although at common law the Crown would have the right of appropriating to payment of its own debts goods of the tenant actually under distress for rent—*Ch. Prerog.*, 287. It may indeed be argued that this result might follow under the bankrupt law from the decisions in *Atkins*, but it has not yet been so determined. The same section next gives a qualified preference to the Savings' Bank, and confirms the operation given by the Customs' Management Act to revenue bonds.

The 24th section directs that after all the preceding claims are satisfied current suppliers shall be paid in full; and the

19th expressly enacts that, after the payment of all costs and expenses and of the claims above enumerated, the estates of insolvent persons shall be distributed rateably amongst the rest of the creditors.

Provisions such as these are surely not consistent with the existence of a preferable right in another class of creditors, to whom no reference is made in the Act, and who certainly cannot be regarded as having, on principles of equity, claims beyond others; and when we further consider that under the earliest of the Imperial Fishery Acts relating to this colony, from 1775 downwards, as well as by local legislation, the interests of current suppliers and of fishing servants were always regarded as entitled to special protection, we cannot avoid the conclusion that to maintain a right in the landlord, by distress, to secure for himself a preferable payment in full of all arrears of rent, however large and perhaps of many years' standing, would be to defeat the obvious intentions of the legislature plainly expressed in the Act under consideration, and to disregard the ancient policy of our laws from deference to English decisions, the force of which in relation to the present subject rests only upon a supposed analogy between our Insolvency Act and the English Bankrupt Acts, and which, however much in accordance with what many years since may have been the genius of English law, can hardly be considered suitable to a community such as ours.

It was however urged by the Attorney General that if, by the sections of the Act to which we have referred, the right of distress is taken away in cases of *declared* insolvency, it would follow, that it could not be exercised against the trustees of a voluntary conveyance under the 26th sec., by which such trustees are compellable, in the distribution of an estate, assigned to them by a debtor for the payment of his debts, to observe the preferences previously provided for, and that thus debtors so disposed might be enabled to defraud their landlords to a very serious extent. But without expressing any opinion as to the true construction of the 26th sec. we may observe, that an *argumentum ab inconvenienti* drawn from that source cannot prevail against the plain intention of the Legislature expressed in the previous sections.

One other argument remains to be noticed, namely, that the estate which the trustees take for distribution under the Act, must be understood to mean an estate subject to the liabilities of the insolvent, and amongst these, to a liability to a distraint

by the landlord; and authorities are certainly to be found, both for and against this position.

Thus, on the one hand—under the Judicature Act, 5 Geo. 4, cap. 51, it was always held that a declaration of insolvency superseded an attachment under mesne process although actually levied, while on the other,—under the 49 Geo. 3, cap. 27, Chief Justice Forbes, in deciding against the claim of a landlord to accruing rent in cases of insolvency, observes, “when rent is in arrears and the lessee becomes insolvent, the landlord having a right to distrain for his rent may commute that right for any proportion of a year’s rent he and the trustees may agree upon.” *Little v. Trustees of Dooling and Kelly*, S. C. p. 38, and the same judge, in *Hunt v. LeMessurier*, S. C. p. 222, followed by Chief Justice Tucker in *Chancey and Brooking*, S. C. p. 355, expressly declares (under circumstances somewhat peculiar the landlord having in that case proceeded by attachment) that in case of a general trader the right of distress on an insolvent estate subsisted, although at the same time he held that *in the cases of premises let for the fishery it was taken away by reason of the landlord being in such case entitled to rank as a current supplier.*

If it be necessary, however, to distinguish these cases it is enough to say, that apart from the fact of the 49 Geo. 3 containing an express provision wanting in the Judicature Act, except as regards criminal trials before the Circuit Courts, that the law of England was to be the rule of decision in the Supreme Court, neither of these Acts contained the detailed provisions for distribution of an insolvent estate, enacted by the 25 Vic., cap. 7; and we are of opinion that the implied preferable liabilities of an insolvent, which attach to his estate in the hands of his trustees, are, in the absence of special circumstances, limited under the true construction of this Act, to cases, in which, as in *re Bulger*, the landlord has, by distress, levied before the issuing of the vesting order, obtained possession of the goods, and thus converted what was previously a remedy, such as the right to an attachment or execution, into a lien, to which, as to other liens, the trustees would be obliged to defer.

For these reasons we are of opinion, that in this case, judgment should be entered for the plaintiff.

*Hon. Mr. Whiteway*, Q. C., for plaintiff.

*Hon. Attorney General (Mr. Carter)* for defendant.

1868, December. HON. MR JUSTICE ROBINSON.

*Merchant and Planter—Freight of Planters and their supplies to Labrador—Liability of Merchant as Receiver of voyage for freight to Ship-owner—Usage of Labrador Trade—Basis upon which freight is fixed.*

A Supplying Merchant who receives the produce of the voyage with a knowledge that freight is due upon it and that he is to pay it to the ship-owner, even though the planter should withhold his consent to such payment, is liable for the freight.

The usage of the Labrador Trade as regards the freighting of planters and their supplies is that the ship-owner is bound to bring back as well as to take down to Labrador the freighter and his effects. If the ship-owner is prevented by the act of God from bringing the parties back then only a pro rata freight would be payable to the ship-owner in proportion to the benefit conferred on the planter.

IF I had been aware of the questions of fact that are raised in this case, I should have referred the determination of them to a jury. I was, however, kept in ignorance of the grounds of defence until the cause had progressed, and when I suggested the expediency of submitting the facts to a jury the parties seemed unwilling and persisted in desiring my decision upon the whole matter; I must, therefore, determine it upon the evidence before me, and I wish it to be understood that my judgment is based entirely upon that evidence, which as regards the usage of trade set up is meagre.

The plaintiffs seek to recover the balance of their account, which includes a charge of £15 7s. 6d. for freight paid on account of defendants, and respecting which item the main controversy had arisen. The plaintiff, Charles Ross, states that in May last he agreed to supply the two defendants for the Labrador fishery, provided they could find means of getting to that coast; that Mr. Heater, who was in the habit of freighting planters in his vessel, the *Wave*, called upon him with reference to the defendants and inquired if he was about to supply them, and being informed that he was Heater took the defendants with their supplies, to the value of over £160, to Labrador upon the usual terms; these terms are regulated by a usage of trade which Mr. Ross declared to be, that the master of the vessel should take to Labrador the defendants and their supplies, and should in the autumn bring them and their produce back if they desired, receiving as compensation for such services freight upon all fish and oil taken by defendants, whether such fish or oil were shipped for market at Labrador or brought back in the

vessel; that it is a part of such usage that the supplying merchant pay freight to the ship-owner for all the produce of the planter he receives, irrespective of the state of accounts between them, and that the master enquires beforehand who the supplier is that he may follow the voyage for the freight. The defendants caught 254 qtls. of fish, and about a tun of oil: 246 qtls. whereof were shipped for foreign market at Labrador, and the value, £159 18s., was placed by the plaintiffs to defendants' credit, and on demand being made upon plaintiffs for freight on such fish by the owner of the vessel, the plaintiff paid the same (amounting to £15 7s. 6d.), and charged it to the defendants. Mr. Heater in his evidence substantially confirms the evidence of the usage.

From the testimony on both sides it is sufficiently clear to me that the defendants objected to the payment of such freight by the plaintiffs, and that they paid it, if not against, certainly without the order of defendants. The *Wave* was lost on 9th October at Labrador in a violent gale, and therefore could not bring back the defendants, but they returned to Harbor Grace without expense to themselves in the *Kitty Clyde*; their oil and eight quintals of their fish had been shipped in the *Wave* for Harbor Grace before she was wrecked, were saved from the wreck and were stored at Labrador, where they remain; for that oil and fish, however, no freight is charged by plaintiffs. The defendants deny the right of the plaintiffs to charge them for any freight, because—

1st—The payment was made by plaintiffs without and against the order of defendants, and therefore was in their own wrong;

2nd—Because no freight was due the *Wave*, inasmuch as she did not fulfil her contract by bringing back to Harbor Grace the defendants and their oil and 8 qtls fish.

As regards the first point, it is quite true that no man can by voluntarily paying the debt of a third person make such third person his debtor, but if the evidence of Ross and Heater be correct the plaintiffs were bound by the usage to pay the shipowner freight for the quantity they had received, it was not therefore a voluntary but a compulsory payment under a legal obligation regarding which the law is laid down.—*Ros, 399.*

On the other hand, the defendants called two witnesses, Mr. John Green and Mr. Thomas Candler, who said that they believed the usage to be that the planter alone is responsible for the freight, and that the supplying merchant is not warranted in paying it—although he received the voyage—without the

express order of the planter; but Mr. Green guarded his evidence by saying that he has been twelve years out of that branch of the Labrador business—that he is aware that within the last two or three years a variation has taken place in the usage respecting the freights in freighting vessels, and that he principally speaks from the practice of his brother's dealers; and Mr. Candler stated, that although it certainly was the general course for the planter to order the payment of the freight to the shipowner he had known instances in which the supplying merchant paid it without reference to such planter. Reviewing the evidence on both sides I arrive at the conclusion that the weight of it is in favor of plaintiffs on this point, and I arrive at such a conclusion with the more satisfaction because I think it is according to justice. It would be an inequitable course that a supplying merchant, who receives the produce of the voyage with a knowledge that freight is due upon it and that he is to pay it to the shipowner, should not be responsible in law to such shipowner even though the planter should withhold his consent to such payment, and I think he is liable unless the shipowner has forfeited his right to such freight, which brings me to the *second objection*. It has been established to my satisfaction, on the evidence before me, that by the usage of trade the shipowner is bound to bring back as well as to take down to Labrador, the freighters and their effects if required; but that rule must be read subject to the act of God, or such overruling cause as without the fault of the shipowner, disables him from performing his contract to its whole completion. In the present case the wreck of the ship prevented the owner from bringing back the defendants; in such an event compensation in the nature of pro rata freight would be payable to the ship in proportion to the benefits the defendants accepted.

Now, here the defendants were carried, with their supplies, to Labrador; they were thereby enabled to earn a large sum of money, and it seems to me that they have practically obtained all the advantages they had stipulated for except having their oil and eight quintals of fish brought to Harbor Grace.

It is to be regretted that they have been so long deprived of the use of that property, but I cannot say that such deprivation is the result of any fault in the shipowner; the expenses of bringing that fish and oil home ought to be deducted from the freight paid—defendant Hanrahan swears that it would be £1 14s., and therefore that sum must be taken off the plaintiff's account.

Mr. Emerson next contended that the *Wave* was lost in consequence of the undue detention of her by her owner on the coast. The evidence, however, fails to show that there was any unwarrantable delay; there was no period limited for her departure; she was in the act of being loaded when she was wrecked on 9th October, and other vessels were there as late as she and were also lost.

The defendants next allege that they gave the plaintiffs an order for the oil at Labrador, which the plaintiffs accepted, by virtue of which they became the transferees and owners of the oil, which was more in value than sufficient to pay the balance of their account. The plaintiff, on his oath, denies any such transfer; the defendant, Doyle, repudiated any such right in the plaintiff, and told the plaintiff he should never get it because he had given no credit for it; and Mr. Emerson, in his address to me, urged it as one of the hardships of the defendants' case that such oil might be damaged when they get it.

The only remaining matter is the defendants' set-off for overcharges, and that is sustained solely by the testimony of the defendant Hanrahan, who deposed that when he took up the goods in his account he enquired of Mr. Ross and his clerks the prices of each article, and it was expressly agreed that he was to have them at cash prices. Hard as it would be to credit such a statement, I should have been bound to give it effect, if it had remained unimpeached; but the plaintiff Ross, positively contradicted it, and swears that he never told, and was never asked by Hanrahan the price of a single article; that he did not agree to furnish the defendants with any goods at cash prices or on any other than the usual dealing prices, which are the prices charged in the account, and he added that he had several conversations with the defendants after they had their accounts, and that they did not object to the price of a single article comprised in their fishery supplies. The defendant, Doyle, who seemed to me to give his evidence in an honest manner, admitted that he never knew an instance of a person being supplied for the Labrador fishery at cash prices, and that if his partner had not told him that he had made such a bargain he should not have expected such terms. In my private judgment I may think some of the charges are high, but if a party receives goods on credit he must expect to be charged at prices corresponding to the various risks the supplier incurs, and as these prices are sworn to be correct dealing prices, I must decide according to the evidence. I believe I cannot accept the defendants' state-

ment about the agreement for cash prices, and I feel constrained to reject the set-off except 2s. mistake in cash. The account will stand thus:—

Amount claimed by plaintiffs	...	...	...	...	£18	19	0
Deduct short credit admitted to have							
been a mistake	...	...	...	...	£2	1	3
Allowances for freight	...	...	...	...	1	14	0
Cash wrong	...	...	...	...	0	2	0
						3	17 3

And I give judgment for ... .. £15 1 9

*Mr. Wood* for plaintiff.

*Mr. Emerson* for defendant.

## ROBINSON AND WILLS v. RIDLEY ET AL.

1868, *December*. HON. SIR H. HOYLES, C. J.

*Master and Servant—Assignment of mercantile business—Liability of assignee for wages due servants by assignor.*

An assignee of a business concern consisting of a house of trade and supplying business, incurs no liability in taking over the servants of the assignor, for wages, due by the assignor to such servants.

THE question raised for our determination in these cases is the liability of the defendants to pay certain balances of wages due by Kenneth McLea & Co. to the plaintiffs as servants of the latter firm in the year 1864, under the following circumstances:

In 1864, and for a year or two previous, Kenneth McLea and Co. carried on business as traders at Burgeo, but at the close of that year, being indebted to the defendants in a considerable sum which they were unable to pay, they assigned to defendants in part payment or as security for the debt, all their premises and trade effects at Burgeo, and discontinued business there. In 1865, Robert McLea, who appears to have previously managed for K. McLea & Co., with the assent of defendants who agreed to limit their claim upon the Burgeo assets to £1000 payable in instalments, carried on a business in which he was supplied by defendants, on the same premises, but at

the end of the year he also gave up business, and the defendants then took possession of the premises and carried on trade there in connection with an establishment of their own at Rose Blanche.

The plaintiffs were servants of K. McLea & Co. in 1864, served Robert McLea in 1865, and were taken on by defendants in 1866; their wages for 1865 and for the time they were in the defendants' service in 1866, appear to have been paid; their wages for 1864 are alleged to be in whole or in part still due. In the fall of 1864, as would appear, but at all events before the transfer, Robert McLea had a conversation at Harbor Grace with defendants, of which he states in his evidence, "I had nothing to say about Wills, *I think* Mr. Ridley was to pay the wages of Robinson, I won't swear that *he did* say he would pay them. I informed Robinson that Ridley was to pay his wages, *but he was to secure himself at all events*, if he was not paid by Ridley. I won't swear that either of the Ridleys promised to pay Wills or Robinson any wages due by Kenneth McLea or by me; my firm belief is that Mr. Ridley at Harbor Grace at the time I handed over the business, said that John Robinson would be protected. I won't swear that Mr. Ridley said that Robinson and Wills should be protected." In a letter dated November 28th, 1865, addressed by Robert McLea to the plaintiff Wills, the writer states that the defendants were to pay the plaintiff's wages; and in a letter dated Nov. 28th, 1865, addressed by Robert McLea to the plaintiff Robinson, the writer states: "Mr. Ridley is to pay your wages, at all events hold on enough fish till you are paid." Evidence was given by plaintiffs to shew that in 1865 Robert McLea *was* agent, and by defendants to shew that in that year he *was not* agent at Burgeo for defendants.

Upon this state of facts Mr. Hogsett, for the plaintiffs, contended that by accepting the assignment of the property and assets of K. McLea & Co's house of trade at Burgeo, and by themselves carrying on business there, and taking over the plaintiffs as servants in the trade, the defendants had become in law liable to pay the balances due plaintiffs by Kenneth McLea & Co.; and further, that if not liable on this ground, they were still liable, because they had, as Mr. Hogsett contended, by themselves and by their alleged agent Robt. McLea, promised to pay the plaintiffs the amount of their claims.

With respect to Mr. Hogsett's first position we have to observe that the assignment to the defendants appears, so far as

the evidence goes, to have been made not in trust for other creditors, but solely for defendants' own benefit, and in payment or as security, in part or in whole, for their debt. It does not therefore come within any of the provisions of the Insolvency Act; and as Mr. Hogsett was unable to refer us to any authority, and as we can find none, to shew that such an assignee would, under the circumstances stated, become liable for the debts of the assignor for the recovery of which no lien or preferable claim then subsisted upon the property assigned, we are unable to subscribe to a doctrine which would, by way of contract, impose upon the defendants liabilities of K. McLea & Co. which neither of the contracting parties intended the defendants should assume, and which might far exceed any advantage that could be derived by them from the assignment.

Upon the second ground we are clearly of opinion that, apart from the fact that the letters of Robert McLea were written after his alleged connection with the defendants had ceased, the weight of evidence is against the position that during 1865 Robert McLea was an agent of the defendants and not an independent dealer trading for his own benefit and that of K. McLea & Co., although with the view certainly of paying the debt due upon the premises, and that, had he been their agent, he would not by reason merely of his employment to manage the trade of 1865, have authority to bind his principal to the payment of a debt owing by another and having no necessary connection with the conduct of his own trade; and we are also of opinion that, without reference to the Statute of Frauds, which (there being no novation or substitution of liability) (*Addison on Cont.*, p. 825), would probably apply to this case, there is no sufficient evidence that the defendants themselves promised the balances due the plaintiffs.

Judgment must, therefore, be entered for the defendants in both cases.

*Mr. Hogsett* for plaintiffs.

*Messrs. Pinsent, Q. C.*, and *Prowse* for defendants.

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1868, *December*. HON. MR. JUSTICE ROBINSON.

*Statute of Limitations—Debt—Specific payment, effect of—Non-suit—Rule nisi.*

In order to take a case out of the operation of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt.

THIS case was tried before me at Harbor Briton, last term. It was an action of assumpsit, the defendant pleaded the general issue and the Statute of Limitations. The latest delivery by the plaintiffs was over six years before action brought; there was not any acknowledgment or promise in writing, nor any part payment sufficient to satisfy the requirements of Lord Tenterden's Act 9, Geo. 4, cap. 14, and upon the motion of Mr. Prowe, for defendant, I non-suited the plaintiffs.

Mr. Hogsett, for plaintiffs, contended that there was a payment of £20, made by the defendants father, within six years, and that such payment barred the Statute, but that payment was made specifically for 40 hogsheads of coal had in 1861, the letter covering the order for the money containing these words: "please receive order on Mr McMurdo for £20, in payment of the 40 hogsheads of coals, &c." Such a payment negatived rather than affirmed the existence of any other or remaining debt, and it has been ruled that a part payment sufficient to bar the Statute must be such as to warrant the inference that the defendant intended to pay the rest, it must appear that it was made part payment of a greater debt.—*Tippets & Heane, 1 C. M. & R.*

I reserved leave to Mr. Hogsett to move, principally because at the trial I had drawn attention to the Act 31 Vic., cap. 8, passed last session of our Legislature, which at the moment appeared to me to have an important bearing upon the case; the 5th sec. provided, "that no claim in respect of a matter which arose more than six years before the action should be enforceable by reason only of some other matter of claim comprised in the same account having arisen within six years." I thought it desirable that the effect of that Statute, which had then for the first time come under judicial notice, should be more maturely considered than it could be during the hurry of a trial at *nisi prius*, and I granted a rule *nisi*.

An examination into the objects of that enactment and the arguments of Mr. Hogsett on the rule, have satisfied me that the section referred to has no reference to an action like the

present; it refers exclusively to the old actions of account which were excepted from the operation of the *21 Jac. 1*, and was passed for the purpose of subjecting such actions to the like limitations that govern other actions.—See *Cottam v Partridge*, *4 M. & G.*; *8 M. & W.*, and *Stephens' Com.* Mr. Prowse, therefore, was right in not noticing the Act on the trial.

Irrespective of that Statute the law is clearly with the defendant, and my judgment must be in his favor notwithstanding my fears that in this particular case justice may thereby be defeated. The defendant's counsel admitted that every article charged in plaintiffs' account had been received by Blackburn, who only objected to some of the prices, and thereupon I suggested a reference to some impartial person, to ascertain a fair price for the disputed articles, and that the defendant should not rely upon the Statute of Limitations if anything should then appear to be due to the plaintiffs; but the defendant declined a reference and insisted upon his strict rights. He was legally justified in doing so, and perhaps may have been morally justified, for it is possible that if the action had been sooner brought, and tried in the life-time of Mr. Blackburn, when his testimony would have been given, he might have shewn that all the just claims of the plaintiffs against him had been satisfied, and thus that law and justice were, as they usually are, in unison.

My brother judges have been good enough to hear this argument with me, and they are both of my opinion that the non-suit was proper and should not be disturbed.

The rule must be discharged with costs.

*Mr. Hogsett* for plaintiff.

*Mr. Prowse* for defendant.

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1868, *December*. HON. MR. JUSTICE ROBINSON

*Evidence—Admission of parol evidence to prove a deed was different from the understanding of the parties to it—Pleading—Equitable replication.*

Parol evidence is admissible to support an equitable replication, alleging that a deed on which the defendant relies, was by mistake expressed in language different from the understanding and agreement of the parties to it.

WE are unanimously of opinion that there was not any improper evidence received; and that the rule *nisi* to set aside the verdict should be discharged.

The question here raised was whether—to support an equitable replication alleging that a deed on which the defendant relied was, by mistake, expressed in language different from the understanding and agreement of the parties to it—parol evidence was admissible.

Before the Common Law Procedure Act parol evidence for such a purpose was always receivable in Equity; and when equitable pleas and replications were introduced into courts of law there were of necessity imported the like modes of sustaining them that before were available in Equity; indeed, it is not clear that parol evidence to avoid a deed on the grounds of fraud or mistake was not always receivable at law.

The various authorities cited by Mr. P. Emerson and Mr. Pinsent, Q. C., for the plaintiff, strongly support their position, whilst the cases relied upon by Mr. Hogsett, which he cited from *Bullen & Leake*, especially *Rees & Scottish Ass. Co.*, do not, when examined, invalidate or even affect it.

The question in that case was the admissibility or inadmissibility of an equitable replication, which the court eventually refused to admit; the question in this was the admissibility of parol evidence to support a replication already admitted by the court after full argument. Here the contest was that there was a vital mistake in the deed, there no such contestation arose, but it was desired to give parol testimony of an antecedent conversation and understanding, with the view of defeating a subsequent written agreement; such evidence was refused upon principles that are equally applicable to proceedings at law and in equity, and were in force before as they have been since the introduction of equitable pleadings.

Let the rule *nisi* be discharged.

*Mr. P. Emerson and Mr. Pinsent, Q. C., for plaintiff.*

*Mr. Hogsett for defendant.*

1869, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Practice*—*New trial*—*Excessive damages*—*Landlord and tenant*—*Covenant to erect*—*Breach*—*Damages, true measure of.*

In an action brought to recover damages for breach of covenant by tenant in not erecting certain buildings on the demised land—there remaining to the tenant thirty years of an unexpired term—(the value of the buildings to be erected being fixed at £2,000), the jury found a verdict for the landlord £750, evidently basing their finding on the £2,000, the value of the work to be done, rather than on the damages that might arise from its non-performance.

On a rule *nisi* to set aside the verdict, on the ground that it was excessive—

*Held*—The rule should be made absolute and a new trial granted, unless the plaintiff agreed to a reduction of damages to £400.

*Held*—The jury should have considered that it was the reversionary interest that was principally injured, and in estimating their damages they should have taken into consideration the length of lease the tenant had before the landlord's reversionary interest should have become an interest in possession.

THIS was an action commenced in November, 1867, to recover damages for the breach of a covenant contained in a lease from the plaintiff to the defendant, dated June 16, 1851, and whereby the plaintiff demised to the defendant certain waterside premises situate in St. John's, for the term of fifty years from November, 1847.

The covenant sued upon was to the effect, that the defendant should, within a period agreed upon by the parties at the trial to have elapsed shortly prior to the commencement of the action, erect upon the demised premises, buildings of uninflammable materials of not less than the value of £2000, leaving a passage way of eight feet wide on the west side thereof from the said street to the south front of the premises.

The breach was assigned generally upon all parts of the covenant; the defendant traversed the breaches assigned, and the plaintiff took issued upon such traverse.

At the trial, which took place in the late term of this court before a special jury, the plaintiff adduced evidence to shew that no building had been erected upon the land except a store comprised of wood, bricks and slate; and which, without leaving any way on the western side of the land, extended continuously, not only over the whole south front of the plaintiff's land, but also over several feet of the defendant's own land adjoining; and further, that the cost of so much of the store as was upon plaintiff's land did not exceed a sum between eight and eleven hundred pounds.

The defendant sought to establish, that the cost of that part of the store, together with the amount expended in the erection of wharves, (which he contended were buildings within the covenant), equalled or exceeded the stipulated sum of £2000.

In his charge Mr. Justice Robinson directed the jury, that in estimating the damages, should they find for the plaintiff, they should bear in mind that the interest of the plaintiff in the subject of the suit was reversionary only, and that the present value of the loss the plaintiff would sustain at the expiration of the lease, by the alleged breach of covenant, should be the amount of their verdict.

The jury found for the plaintiff—damages \$3000, and a rule nisi to set aside the verdict on the ground that these damages were excessive, having been obtained by the defendant, was subsequently argued by Messrs. Kent and Little for him, and by the Attorney General and Mr. Pinsent for the plaintiff; and now stands for judgment.

Upon the argument the defendant's counsel relied mainly upon the fact, that the sum awarded by the jury would, as appeared by an affidavit of Mr. T. R. Smith, amount at the end of the lease to \$15,332 if placed at compound interest, and to \$8,040 if at simple interest. The plaintiff's counsel citing *Creed and Fisher, C. L. and E. R.—4 Burr. 2229—1 Saunders, p. 58—Sel. N. P.—2 B. & A. D. 722, and 5 Dow 312*—contended that the £2000 were liquidated damages—that by reducing the damages below the difference between the amount expended and that sum, the defendant would save a large amount of interest and would thus profit by his own wrong; and that under one view of the evidence the verdict accurately represented the damage done to the plaintiff's reversionary interests; but I am unable to go to the full extent with either party on these points, for as on one hand, it would be unreasonable to test the correctness of the verdict by a calculation at compound interest, so on the other, the £2000 cannot be regarded as liquidated damages, not only because, as pointed out by Judge Robinson, this sum is rather the measure of the work to be done than of the damages that might arise from its non-performance, but because liquidated damages are a sum agreed to be paid in a certain event by one party to the other; whereas the £2000 was to be expended for the benefit of both parties, of the tenant during the term, and of the landlord after its expiration. And further, were it certain that (as it was contended for by the plaintiff's counsel), a reduction in the damages would ensue to the profit

of the defendant in giving to him a certain amount of interest during the remaining years of his lease, (a point not so clear, as while saving this interest on the one hand he would lose the advantage of the additional expenditure, whether as occupier or upon a sale of the term on the other), the true question is not what the defendant profits, but what the plaintiff loses by the breach of covenant.

After much consideration of the whole subject, and a careful, but, I regret to say, fruitless search for further authorities bearing upon it, I am of opinion that the verdict is excessive to a degree leading to the inference that the jury must have overlooked or misapprehended the direction of the court, or that in giving effect to it they made their calculations upon a wrong principle. Assuming the last position as most likely to be the true one, the jury would seem to have adopted the measure of damages put before them by the parties at the trial, and, I believe, concurred in by my brother judges, by giving the difference between the amount actually expended by the defendant and what he ought to have expended under the covenant; but making a deduction (in itself insufficient) on account of the time to elapse before the plaintiff's interest would vest in possession.

But, in my opinion, this difference ought not to have been taken into account, except for the purpose of determining generally whether the covenant had been broken or not, and as an element in settling the amount of rent frequently referred to; and that for these reasons:—

1st—The difference between the £2,000 and the sum actually expended might, from the character of the buildings upon the ground, be insufficient to render them uninflammable. In the present case the difference is probably more than sufficient for that purpose, but the fact that in any case of the like character it *might be insufficient*, in which event the plaintiff on payment to him of that amount would not receive full compensation, shews that this difference cannot be the true measure of damages.

2ndly—The object of the covenant was not that the plaintiff should have a present sum to expend in buildings on his coming into possession at the end of the term, when from depreciation in the value of money the sum awarded might be of much less value than was intended, but that he should, at the expiration of a lease, have buildings of a certain character and cost upon the land, such as would materially increase its rent value, and,

if so, such a measure of damages should have been adopted as would most nearly have carried out this intention, and this measure would be found, in comparing the estimated future rent of the premises in their present condition with their estimated future rent with buildings on them conformable to the covenant. It is true that in this mode of calculation also there would be an element of uncertainty, as the value of the reversion might rise or fall before the end of the lease, but this contingency must have been in the contemplation of both parties when they entered into the covenant, and its operation can, therefore, do no wrong to either of them.

The verdict ought, therefore, to be set aside upon payment of costs, unless the plaintiff will consent to reduce it to sixteen hundred dollars, an amount which, on the principle here referred to, would, in my opinion, meet the justice of the case, as is shown by the following calculation.

Having regard to the nature and situation of the premises, and the character of the present buildings, the premises would at the expiration of the term probably let for fifty pounds a year more than they would with the present erections only. I found this estimate partly upon the evidence in the cause and partly *ex necessitate rei* from my own acquaintance with the value of premises such as those under consideration. Sixty pounds a year at five per cent would represent twelve hundred pounds the present value of which would be something under four hundred pounds, calculating simple interest only, but assuming that the interest would, to a certain extent, be made available as principal, by suffering it to accumulate for successive periods of five years each, and charging simple interest upon each accumulation.

The excess over £1200 of the actual result of this calculation as applied to four hundred pounds, I think the plaintiff entitled to upon this ground.

Under the covenant, if faithfully executed, the plaintiff would have not only the buildings at the end of the term, but increased security from fire during the term. By the fault of the defendant, the plaintiff will have to pay a higher rate of insurance than would be necessary if the cost of the present building had been expended in accordance with the covenant. The excess to which I have referred would seem to be only a reasonable compensation for this damage, but were it doubtful if this damage would amount to such excess, I would not on that account reduce the verdict below \$1600, because any prejudice that

might arise from doubt or difficulty, in determining the issue between the parties, should fall not on him who has suffered but on him who has done the wrong.

Value of \$1600 (£400) at the expiration of 30 years, calculated on the principles of the preceding judgment:

Verdict (say) ... ..	\$1600
30 years interest on ditto at 5 per cent. ...	2400
25 years interest on 5 years interest (\$400) ...	500
20 years interest on ditto " ...	400
15 years interest on ditto " ...	300
10 years interest on ditto " ...	200
5 years interest on ditto " ...	100
	<hr/>
	\$5500
	<hr/>
	£1375

With the consent of my brother judges who, though differing from me upon the principle of calculation, have arrived at nearly the same conclusion as to amount, I direct that the verdict be set aside and a new trial had upon payment of costs, when the plaintiff will consent to the verdict being reduced to \$1600.

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HON. MR. JUSTICE ROBINSON:

I have given to this case much consideration, and I am of opinion that justice requires a reduction of damages, or a new trial.

I give my adhesion to the principles enunciated in the several cases cited by the Attorney General respecting new trials, and admit that the Court should be slow to disturb the verdict of a jury, and usually should grant a new trial for excessive damages only where the verdict would seem to be perverse, or the damages would appear to have been calculated upon erroneous principles; it is upon the latter ground that I think this verdict is not sustainable.

The action was brought to recover damages for breach of covenant, by tenant not erecting certain buildings upon the demised land—there remained to the tenant of his term, thirty years. I directed the jury that if they found for the plaintiff they should remember that it was his reversionary interest that was principally injured, and should take into their consideration

in estimating damages the length of term the tenant had before the plaintiff's reversionary interest should become an interest in possession. The jury found a verdict for the plaintiff, and assessed his damages at £750.

They seemed to pay due attention and I am persuaded they intended to do justice, and I fear that I failed to make myself sufficiently understood, for I believe they altogether miscalculated the proper measure of damages, as will appear by the figures I append hereto.

The defendant obtained a rule *nisi* to set aside the verdict, because such damages were excessive. In considering that rule I review the whole evidence, and to a certain extent I put myself in the position of a juror, and ask myself what verdict ought to have been given, upholding the verdict in all points of doubtfulness, and leaning so far against the defendant.

The result of such review has led me to the conclusion that the verdict ought to be reduced to £416 cy., or that, that the defendant should have a new trial upon payment of costs; but for the reasons hereafter given, I concur in the sum of £400 cy., as that to which the verdict ought to be reduced.

Amount that tenant should, under his covenant, have expended in uninflammable buildings ...	£2000
Deduct the value of the present store on the land demised, according to the evi- dence of plaintiff's witnesses, South- cott and Nevill ... ..	£847
Deduct necessary expense of piling, ac- cording to Southcott's evidence, that which is there having stood the test of 20 years ... ..	258
	<hr/> £1105
Less expense of iron casing doors and windows, and building a west wall within 8 feet of plaintiff's western boundary ... ..	£70
Less for extra premium on £1000, in con- sideration of the thinness of the pre- sent brickwork, $\frac{1}{4}$ per cent. per annum for 30 years ... ..	75— 145— 960
Leaving a deficiency in consequence of breach of covenant of ... ..	<hr/> £1040

What present sum will at the end of 30 years, with 5 per cent. per annum simple interest, produce £1040? Answer, £416 cy.

Whilst we all agree that the verdict is excessive, and that justice requires that it should be reduced, it seems that we are not unanimous upon the principles on which such reduction should be calculated, nor upon the amount to which the verdict should be reduced. By the calculations of my brother, Hayward, it should be reduced to £350; by that of the Chief Justice to £400; by mine to £416 cy. In order that the Court should arrive at a judgment, it is necessary that in matters of mere detail each of the judges should concede (as we have done) somewhat to the opinions of each other, and we mention our respective opinions merely for the satisfaction and guidance of the parties.

It will be observed that in my calculations I only allow five per cent. per annum simple interest, because, although by an Act passed in 1834 six per cent. per annum was fixed in certain cases as legal interest, I am aware that money then could more easily command six per cent. than it now can command five per cent.

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HON. MR JUSTICE HAYWARD:

In the case of Thomas, executor of Hutchings, v. C. F. Bennett, tried in the last term of this court, for breach of covenant in not erecting buildings of uninflammable materials of the value of £2,000, the jury returned a verdict of \$3,000 damages.

Subsequently, upon argument, a rule *nisi* was granted to show cause why this verdict should not be set aside and a new trial granted, upon the ground that the damages were excessive.

The case came on for hearing before my brother Judge (Robinson), and I had an opportunity of hearing the greater part of the evidence adduced, and have since further informed myself regarding it. The plaintiff alleged that the £2,000 were not expended according to the terms of the covenant, whilst the defendant contended contra, and there was evidence of an expenditure under the covenant to the amount of about £1,100.

Judge Robinson spared no pains or trouble in laying the case before the jury, and did so as clearly as it was possible; but, upon a review of the whole of the evidence, and considering all the circumstances of the case, I am of opinion that the damages are excessive and not warranted by the facts.

The jury that tried the case appeared to give much attention to the evidence, with a view, no doubt, of doing justice between the parties; but it seems that they must have misconstrued the judge's charge, or were mistaken as to the extent of the defendant's liability under the covenant.

The damages sought to be recovered were those to a reversionary interest, which would not vest until the expiry of thirty years. If the interest in the property had vested in the plaintiff and this verdict given (or even for a larger sum), I would hold it to be in accordance with the justice of the case, but considering that no damage can be sustained by the plaintiff until the lapse of that time, and that he is entitled to his annual rent until the expiry of the lease, I have no doubt of the verdict at the present being excessive in damages.

Should the defendant be now compelled to pay the amount of verdict it would alone, at the end of the lease, with interest, amount to a larger sum than he stipulated by his covenant to expend, besides the amount he proved upon the trial that he actually did expend.

I am reluctant at all times to interfere with the province of a jury, but yet would feel a responsibility if we would refuse doing so when it is apparent that they have misconceived the matter at issue, or where the administration of justice calls for our interference.

Under all the circumstances of this case I am of opinion that the rule for a new trial should be made absolute, except the parties consent to accept a suggestion for reduction of damages and the entry up of a verdict for £400. Judge Robinson has taken much pains to arrive at a just estimate of the present damages, which he has shown to me, and in which I coincide in amount and in the principle upon which his calculation is based, with only one exception as to amount, and that is, that I had made my calculations at six per cent. interest, that being the rate fixed by statute in certain cases, which would reduce the damages to about £350; but, as my brother judges consider that the larger amount should be the estimate, I waive my opinion in this respect in favor of the plaintiff, who has obtained the verdict of the jury, who I consider should receive the benefit of any doubt, and concur in the sum which I first named.

*The Attorney General and Mr. Pinsent, Q. C., for plaintiff.*

*Mr. Kent and Mr. Little for defendant.*

1869, *July*. HON. MR. JUSTICE ROBINSON.

*Master and servant—Wrongful dismissal—Agreement for one year—Damages.*

The plaintiff entered on his services as a clerk for one year from January 1st and was discharged without cause on the 7th of February following. It appeared he might have continued in the service at a reduced rate of wages. In an action for damages,

*Held*—Where one party to an agreement declares his intention not to fulfil his side of it the other party may regard such declaration an absolute breach and at once sue for damages. If a servant is hired for the year and during the year dismissed without cause he is entitled to his wages to the end of the year.

In this action the plaintiff sought to recover damages for the wrongful dismissal of him, by the defendants, from their service as a clerk.

He declared specially upon an agreement for one year from 1st January, 1868, at £130 wages, and alleged that he was discharged without cause on 7th February, 1868.

There was much conflict of evidence, and I submitted the following questions to the jury:—

First,—Had the plaintiff proved, to their satisfaction, the agreement he had set out?—if so,

Second,—Had the defendants broken that agreement by dismissing him without cause?—if so,

Third,—What damages had the plaintiff sustained?

In commenting upon the second question I told the jury that if a master inform his servant that he will not pay him the amount of wages he had agreed upon, and that the servant may stay or go as he pleases, but if he stays he must do so for a less sum,—that such conduct on the part of the master would, in my opinion, amount to a breach of contract by him, and be equivalent to an actual dismissal.

In commenting upon the third question I told the jury, that if in the case of an entire contract for a whole year's service, a master should wrongfully dismiss his servant, such servant would in strictness be entitled to his whole year's wages, or to such lesser sum as the jury should deem sufficient, taking care to credit the master with the value of any employment in which the servant might be engaged during the year.

The jury found a verdict for the plaintiff, and assessed his damages at £92 12s.

A rule *nisi* was obtained by the Attorney General for the defendant, to set aside that verdict upon the grounds of mis-

direction in the two instances above referred to, and also for excessive damages.

The rule had been argued and we have carefully considered the question raised.

We all thought that the verdict was somewhat larger than the evidence warranted, and without determining whether the excess would or would not justify the Court in disturbing it we suggested to the plaintiff's counsel the propriety of their consenting to reduce the damages to £82 10s., in which suggestion they promptly acquiesced; and thus that point is disposed of.

With regard to the other two questions, we are unanimously of opinion that there was not any misdirection.

No authority has been cited to support the position that my comments on the first question were incorrect. Upon general principles it would seem to me unreasonable to expect a servant to give a year's labour, with a lawsuit to recover his wages at the end of it, impending over him; sure I am that if the plaintiff had continued in the defendant's service after Mr. O'Brien had distinctly told him his wages would be £100 and no more, that Mr. O'Brien would not have paid him more, and no jury would have awarded him more. It is however expressly laid down in 2, *Smith's Leading Cases*, p. 33, that where one party to an agreement declares his intention not to fulfil his side of it, and absolutely refuses to perform it, the other party may consider such declaration and refusal an absolute breach, and at once sue for damages.

With regard to the *strict* right of the plaintiff to have recovered his whole year's wages, less the amount or value of such services as he had bestowed elsewhere during the year, only one adjudicated case was cited by the Attorney General, *Goodman v. Pocock*, 15 Q. B., and that is confirmatory rather than contradictory of the direction I gave the jury, such direction being substantially the same as Mr. Justice Earle there thought the proper one to be given although not exactly in the same language. The rule of law is thus broadly laid down in *Roscoe*, p. 350, "if a servant is hired for the year, and during the year his master dismiss him without cause, he is entitled to his wages until the end of the year."—*Beeston v. Collyer*, 4 Bing; *Lilly v. Ellwyn*, 11 Q. B.; but I modified that rule by directing the jury to deduct the value of the servant's work when otherwise employed, and thus made the direction conformable with that in the case.

The Attorney General strongly contended that I had invaded the province of the jury by giving them my opinion of the effect of the evidence as to an implied dismissal by the defendant, but we are not able to agree in that view. In my judgment it is one of the most important functions of a judge to assist a jury in arriving at a correct conclusion by telling them plainly what are his views respecting the proper inferences to be drawn from given facts; he may evade responsibility by abstaining from that course and may escape trouble by a general and inconclusive charge, but modern practice in England does not countenance that procedure on the part of a judge, and my experience in this country convinces me that justice is best administered by the Court assuming its full share of the trial by jury.

As there is no ground to support the rule *nisi* for misdirection, and as the justice of the case has been fully met by the damages being reduced, the rule must be discharged but without costs.

*Mr. Hogsett and Mr. Little for the plaintiff.*

*Attorney General for defendant.*

## POWER ET AL v. MENCHINTON, ADMX.

1869, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Will—Construction of—Words: “The remainder to be divided between the parties”  
—Inoperative will as evidence of a collateral fact.*

Where the testator's will, after naming several legatees for certain specified legacies, concluded with the following residuary clause: “The remainder to be divided between the parties.”

*Held* (Hoyles, C.J., differing)—The words do not mean the next of kin, but the parties named just before in the will. The article “the” has a restrictive operation.

An inoperative will is evidence as an admission under the hand of the testator to confirm or contradict testimony of an independent transaction of his.

THIS suit was heard in the February term of this Court, upon bill, answer and evidence.

The bill set forth—that William Menchinton, late of Saint John's, trader, died in St. John's on the tenth of June, A. D. 1866, leaving him surviving his wife, Grace, the defendant above

named, three daughters, namely, Amelia Anne, above named; Mary, the wife of the defendant James Winsor, and Louisa, wife of Thomas Winsor, and a grand-child, Wm. J. M. Gibbons, son of Jane, a deceased daughter of said William Menchinton. That said deceased was at his death possessed of considerable property, and that in January, 1860, he made the following will, which was duly proved in this Court:—

“This is my last will and testament made in the year of Our Lord 1860. I hereby will and bequeath to my beloved wife, after my death, the sum of £1000, which is now deposited in the Union Bank, with five shares at £50 per share (£250) with the house we occupy on Military road; To my son, John Menchinton, £300, with my place and property at Exploits, Burnt Island, Green Bay, with all outstanding debts that are due me at this present date; To my daughter Mary Winsor, the sum of £800, which is now in the house of Baine, Johnston & Co.; To my daughter Louisa Winsor, the sum of £500, which is now in the house of Baine, Johnston and Co., with house and back ground in Water street, occupied by Stares and Blundon; To my daughter Amelia Ann, the sum of £500—the remainder to be divided between the parties.”

That John Menchinton mentioned in the said will died in the year 1866, intestate, leaving no children—that complainants had received the sum of £500 mentioned in the will, but no part of the residue which was considerable, and prayed an account and distribution.

The defendants by their answer admitted the facts stated in the bill, and averred their readiness to account and distribute, but submitted that the property mentioned in the will as situate in Exploits, Burnt Island, and which complainants insisted was part of the residue, was in Equity the property of the defendant James Winsor, and that the share of complainant Amelia Ann in the residue ought to be settled to her separate use; and they further prayed the direction of the Court, as to whether the testator's grandson William J. M. Gibbons, was entitled to a share of the residue as one of the “parties” to whom it was bequeathed.

At the hearing, on which Messrs. Little and Kent appeared for the complainants, and Mr. Whiteway, Q. C., for the defendants,—the questions raised for the consideration of the Court were those submitted by the defendant's answer, and these we have now to determine.

To take the second question first—It is a rule of the Court of Chancery, well settled and of very frequent operation, that where a husband seeks the assistance of the Court to recover and reduce into possession his wife's *chose in action*, the Court

will, as a condition of the required aid, insist upon a competent settlement upon her and her children being made from the subject of the suit, *Lewin* 481, *1 Maddock's* 480, *Story*, Sec. 145, unless the wife in open Court or upon examination apart before a judge or a commissioner disclaim that benefit, *1 Daniel* 94

In the present case there has been no such disclaimer, and upon this point therefore our decree must be in the usual terms. The question of the amount of such settlement (generally one-half the subject matter) may be reserved until the coming in of the master's report, but as the complainant, John, has already received the whole of his wife's legacy of £500, I think the whole of her share of the residue should be so settled unless it should amount to more than that sum

The first question, as to the right of the defendant Winser to the property in Exploits, is one of more difficulty.

This claim seems to be grounded upon the well-known principle of Equity jurisprudence, that where the owner of land, seeing another under the belief that the land is his, expending money upon it in buildings and improvements, permits such expenditure without giving the occupier notice of his own better title, he shall not be permitted to reclaim the land, at least without compensation for the improvements—*1 Mad.* 263, *Story* Secs. 388, 781, 786. In the present case Winser was certainly aware when he built, that the land was not his, but then (as he alleges) he had the assurance of the testator that the land would be given to his daughter, Winser's wife, and that his (Winser's) improvements would thus be for his own benefit; and if this were so I can see no difference in Equity between fraudulent acquiescence in another's mistake for one's own benefit, and the wilfully misleading him with a like object or with a like effect. The latter case is indeed the stronger of the two; clearly in such circumstances Menchinton could not himself, without making compensation, reclaim the land, and if not, neither could his estate after his death, *Story*, S. 788, and the present claim would therefore come under the rule if brought by the evidence within its operation, and this would seem to be the whole question on this branch of the case. Winser relied in support of his claim upon a conversation had upon the premises between himself and the testator in 1863, after the death of John Menchinton, at a time when Winser, who had purchased the testator's business, was apparently in possession and about making improvements, to the effect, that he, the testator, would not be responsible for the cost of such improvements, as they

would be for Winsor's own benefit inasmuch as he, the testator, intended to give the premises to Winsor's wife; upon his continuing in possession to the time of the testator's death in 1866, without rent being paid or demanded; upon the improvements made at his own expense, part of which testator was certainly aware of, and of the whole of which, he must, having regard to the relations subsisting between him and his son-in-law, have known; upon the declarations made by the testator to his own wife, the defendant Grace, to the effect that he had given the premises to Mary Winsor; and upon the testator's informal will of 1866, devising the premises in accordance with this declaration.

The complainants, on the other hand, relied upon the fact, that in 1863, after John Menchinton's death and before Winsor went into possession, the testator had proposed to the complainant Power, to establish him in business on the premises, and opened an ineffectual negotiation for the purchase of machinery with that object, circumstances apparently inconsistent with the design of bestowing them on Winsor; and they contended that the improvements which the latter had undoubtedly made, were effected, not in reliance upon the testator's promise but for the better conduct of his own business; that the proof of the conversation on the premises to which Winsor had deposed, was defective, for want of the testimony of Dutton and Tilley, two residents of Green Bay, alleged by Winsor to have been present on the occasion; and that the writing of 1866 having been pronounced against as a will, was inadmissible for the purposes for which it had been adduced.

We are all of opinion, however, that although the invalid will would be inoperative to establish a trust—*Lewin*, p. 46; or generally speaking, to control the construction of the true will, *1 Jarmin* 387, it would be good evidence of a collateral fact, such as the payment of a debt to the testator did it contain an admission to that effect, or in confirmation of the statement that the conversation referred to actually took place, *Smith and Atterson*, *1 Russell* 276, and after duly weighing the evidence on both sides with reference to the authorities bearing upon the subject, we think that although it might have been desirable to have had the testimony of Dutton and Tilley, either for the defendants to sustain Winsor's statement, or for the complainants to disprove it, the preponderance is plainly in favor of the defendants, and sufficient to sustain Winsor's claim, and that he is consequently entitled to retain the premises unless the estate will reimburse him for his expenditure.

Upon the question—Who were meant by the term "*parties*" in the testator's will, I have the misfortune to differ from my brother judges, they regarding it as applicable only to the legatees previously named, while I am of opinion that it includes all who, had the testator made no will would have shared his estate, namely, his wife and *all* his children, the children of deceased children representing, as they legally and naturally would, their deceased parents.

The term is in itself vague and indefinite, and there is nothing in the context to indicate its meaning with any certainty; to determine, then, what the testator intended we must put ourselves in his position at the time of making the will and consider the circumstances by which he was surrounded,—*1 Jarmin, 393*; and, unless from these, taken in connection with the will itself, we can solve this difficulty we can only declare the bequest to be void for uncertainty. This alternative, however, we ought not to adopt until after we had wholly failed in all attempts to discover the testator's meaning,—*1 Jarmin, 330*; and we are not I think reduced to this position. The word *must* mean either the legatees previously named or those who naturally and in law would have claims upon the estate, the deceased's next of kin. To give it either construction words must be supplied; in the former case, the words "aforesaid," "before mentioned," or the like; in the latter, such expressions as "entitled in the ordinary or natural course," or "as my next of kin" To ascertain to which of the two classes the testator referred, let us apply the rule laid down in *Jarmin* and above referred to.

When about to make his will the testator would call to mind first, his property, the *subject* of his bequests; and secondly, the *objects* upon whom it was to be bestowed, naturally his wife and children, and proceed to complete his purpose. He has made a complete disposition as far as the *subject* of his will is concerned, why should he not have made a complete disposition as regards the objects of his intended bounty by providing for all his family instead of leaving part wholly unprovided for? He could not have forgotten his grandchild, even if then absent from the colony (a point on which there is no evidence), as his intellect does not seem to have been impaired, if we may judge from the fact of his carrying on business for more than three years and of his surviving for more than six years after making his will. If he had not forgotten him, would he designedly exclude him from all share of his estate? To do this would

be unnatural and unjust, and we have nothing to lead us to suppose that the testator intended to be either one or the other. By the Roman law a will might be set aside as inefficient, as not consonant with natural affection or moral duty if it totally passed by, without assigning a true and sufficient reason, any of the children of the testator; and, although this rule has no place in the law of England, yet even with us a will of that character would be held to much stricter proof than one not open to this objection,—*1 Will, Exors. 32*. What if the testator had given specific legacies to two only of his children, omitting all mention of his wife and his other children, would it not be a harsh and unreasonable construction to say that “parties” meant only those of his family who had previously been expressly named, and yet the difference between such a case and the present is only in degree not in kind, and why should such construction prevail in one and not in the other?

In my judgment, the mind of the testator at the time of making his will was to give a special benefit to his wife and those of his children who had remained in this country, from whom from time to time he probably received acts of kindness and attention, and between whom and himself warmer feelings of affection would naturally subsist; and having thus gratified a reasonable and obvious preference to allow the rest of his property to pass to all who had legitimate claims upon him and it. This he will have done if the word “parties” receive the interpretation for which I contend, but if its application be restricted to those previously named, he will, without any apparent reason, have altogether ignored the interests of one whose natural claims upon him were by no means so inferior to the claims of those for whom he has amply provided as to justify their being entirely disregarded.

Our opinions on this question, however, can only be regarded as *obiter dicta*, expressed at the desire of the parties to the suit, in the hope of producing an amicable adjustment of the grandson's claims (if any) out of court; as he, being no party to these proceedings, cannot, of course, be noticed in the decree we make, which is as follows:

Let it be referred to the master to take an account of the estate and to report thereon, with liberty to all parties to except as they may be advised. In taking the accounts let the master exclude from his consideration the property situate at Exploits Burnt Island, unless those interested in the estate will reimburse the defendant (Winser) for improvements made

thereon by him after the date of the conversation before referred to, and in that case let the master inquire into and report the cost of these improvements; should the legatees decline to take the property on this condition, let it be conveyed by the administratrix to the separate use of Mary Winsor and her children; let the master also report as to what will be a sufficient settlement to be made from their shares of the residue upon the testator's married daughters and their children, and let the question of costs and all further directions be reserved until after confirmation of the master's report.

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HON. MR. JUSTICE ROBINSON:

The complainants are the son-in-law and daughter of the late William Menchinton, and by their bill they demand from the defendants (Grace Menchinton, widow and administratrix of William), an account of the estate of the said William in her hands, or under her control, and a distribution of the residue pursuant to the will, the material parts of which are as follows:—"This is my last will and testament made in the year of our Lord 1860. I hereby will and bequeath to my beloved wife, after my death, the sum of one thousand pounds, &c., &c.; to my son, John Menchinton, three hundred pounds, and my place and property at Exploits Burnt Island, in Green Bay, &c., &c.; to my daughter, Mary Winsor, the sum of eight hundred pounds, &c.; to my daughter, Louisa Winsor, the sum of five hundred pounds, &c., &c.; to my daughter, Amelia Anne, the sum of five hundred pounds; the remainder to be divided between the parties."

Grace Menchinton, by her answer, states that the said Amelia Anne Power had received the said legacy of £500 bequeathed to her, that John died during the lifetime of the testator, that she as administratrix hath certain monies belonging to William Menchinton's estate undistributed, and that there are certain debts due to the estate, but that she hath no chattels of the said testator except a few articles of household furniture of small value; that she hath always been ready and willing to render an account of the said estate and to give full information concerning the same, and also to make distribution according to law of any residue, but that complainants insisted that certain land and property at Exploits Burnt Island was the property of the said testator at the time of his decease, and that complainants should have a share of the same or the

proceeds thereof, whereas the property was in possession of the said James Winser and Mary, his wife, at the time of the testator's decease, and the said James Winser hath laid out large sums of money thereon and claims the same as his property, and that, therefore, defendant could not give complainants a share thereof. She also, in her answer, states that the testator left a grandson named Gibbons, the son of a daughter who had died before testator, and prays the direction of the court whether such grandson is not entitled by virtue of the said will to participate in the said residue of the said estate.

And she also prays the direction of the court whether a settlement should not be decreed of the share of the said Amelia Anne, in the said residue, to her sole and separate use. A general replication was filed putting in issue defendants' answer and evidence taken.

On the hearing, James Winser, with the consent and at the desire of the complainants, of the defendant administratrix, and of himself, was made defendant to the suit in conjunction with the said administratrix.

The questions which the court has to determine are—

First—Is the landed property at Exploits Burnt Island assets of the deceased and distributable?

Second—Is the grandson, Gibbons, entitled to a share of the residue by virtue of the words of the will, "the remainder to be divided between the parties"?

Third—Ought the court to decree a settlement to be made on the daughters of testator for their sole and separate use?

A good deal of evidence has been taken, which I have carefully read; I have considered the comments of the learned counsel upon the same, and an examination of the whole testimony on both sides leads my mind to the conclusion upon the—

First point, that the lands at Exploits, Burnt Island, are the property of James Winser, or his wife, and are not assets of Mr. Menchinton's estate. This property was first bequeathed to John, but he having died several years before the testator the legacy lapsed; it is in evidence, on the oath of the widow and administratrix Grace, and on the oath of James Winser, that after John's death the testator put James into possession of that property, stating that it was to belong to his daughter Mary, wife of said James Winser—that on the faith of that statement and possession James Winser expended large sums of money out of his own funds in repairing and improving the

premises, with the knowledge of the said testator and with the declaration by him that James Winsor was making such expenditure for his own use and benefit.

The administratrix corroborates that testimony in all particulars, and it is powerfully confirmed by the contents of a paper writing under the hand of the testator himself, bearing date 28th April, 1866, which he intended to be his last will, but which failed to operate as a will owing to the fact that although executed by William Menchinton in the presence of two witnesses after having been carefully read over to and approved by him, those two witnesses were not the two in whose presence the will had been read over to him, and the requirements of the Wills' Act not having in this respect been complied with, the said paper writing could not be admitted to probate as a will—but although it is not a will it is evidence, as an admission under the hand of William Menchinton, to confirm or contradict testimony of an independent transaction of his; in this paper I find it expressly declared by Wm. Menchinton, that the property at Exploits, Burnt Island, was bequeathed to Mary Winsor.

With such evidence under the hand of the testator I cannot distrust the testimony of James Winsor and Grace Menchinton. I am therefore of opinion, that if William Menchinton had been alive specific performance would have been decreed, and he would have been required to execute a legal conveyance to James Winsor of these premises at Exploits, Burnt Island, or reimburse him for the money he had so expended—and that Menchinton's widow, as his representative, must now execute such conveyance to him or make such reimbursement.

With respect to the second point, it is observable that there is not any evidence before us that the grandson, Gibbons, is alive, or ever was seen by, or known to the testator, or indeed that such a person ever existed; the fact is denied by the replication and so far as the evidence is concerned he may be a myth, however both parties at the hearing, seemed to assume that there was such an individual, and one of the learned counsel stated that he lived in Australia; whether he be alive or not, it is certain that he is not before the Court as a party to these proceedings, and will not be concluded by our opinion, which at present is a mere *obiter dictum*, for against him we are not in a position to make a decree, but if we were, I should be of the same opinion as I am at present. We are asked to read the words "the parties," as "my next of kin"; now I find no au-

thority in law or rule in grammar to warrant me in taking that liberty with language; it seems to me a strained and unnatural construction, and in my opinion it would be exactly contrary to the intentions of the testator so far as I can gather them; as the wife is not of kin to her husband it would have the effect of excluding the widow who was in his mind and affections and by his side, from any share of the residue, and of including a relative whom he does not recognize, or appear ever to have seen or known, or who if in the world, was at the other side of it. The language of all such documents must be read and understood *secundum subjectam materiam*, and as Lord Ellenborough said in *R. and Stevens, 5 East, 260*, "shall be understood in the sense the words bear in ordinary acceptation, and where the sense is ambiguous the meaning may be ascertained by the context"; the second word in the sentence under consideration affords an apt illustration of this rule, "remainder," remainder of what? no corpus had been previously mentioned, out of which parts were carved, yet both sides with one consent admit that the subject matter under consideration sufficiently indicated that it was the remainder of his general estate to which the testator referred, and out of which he had made special bequests; so with regard to the "parties" who were to have this remainder, the subject matter points out who were meant, he had just named his widow and every one of his living children (and them alone) as objects of particular legacies, and having given each something specifically, he immediately adds that "the remainder shall be divided amongst the parties," meaning, in my opinion, the parties named just before; such is the grammatical effect of using the definite article "the," which has a restrictive operation, and confines the subject to the particular thing or person previously mentioned.

As regards the *third point*. I was at first disposed to think that the property at Exploits should be conveyed to trustees for the sole and separate use of Mary Winsor, and the share of the residue of the estate coming to Amelia Anne Power and Louisa should in like manner be settled upon them, unless the husbands should agree to make sufficient settlements upon their respective wives, or the wives should expressly declare that they did not desire any such settlements; but on further consideration and after looking into the authorities I doubted whether the present is a case which calls for the special intervention of a Court of Equity in derogation of the common law rights of the husband.

It is to be remembered that a husband is under the legal obligation to support his wife and children, and on that account as well as in consideration of their identity of interests, the law vests in him the personality of the wife; moreover, it is not always conducive to the happiness of married life that the wife should be independent of her husband, and to warrant a Court of Equity in depriving him of his legal privileges it is laid down that "the intention to deprive the husband of any benefit from the property bequeathed to the wife must be clear."—*1 Babb, 738.*

The wife possesses, however, a ready means of disclaiming a settlement, but when she does not do so a Court of Equity usually interferes (where a suit is pending before it, and its aid is required) to secure a settlement upon the wife and children. In this case I observe that it is to his daughters by name that Menchinton bequeathed the legacies, and not to their husbands; and therefore I shall be willing to concur in an order of reference to the master to report upon a sufficient settlement on each of the daughters, unless they shall respectively disclaim in open court or before one of the judges a desire for such settlement, in which event I should not be disposed to interfere between husband and wife.

As respects the general costs of the cause, I think I may as well mention now what the leaning of my opinion is. Although the complainants are entitled to the account they ask, the administratrix does not appear ever to have refused such account; the complainants are also entitled to a division of the residue, but that division appears to have been mainly prevented by the unsuccessful claim of the complainant to a share of the Burnt Island property, and for these reasons, I think they ought not to get their costs either from the estate or from the defendants.

The administratrix, on the other hand, appears to have retained in her own use the household furniture far beyond the time she was justified, and also some portion of the residue that might have been distributed ere this, and therefore, with the information that I at present possess, I do not think she ought to be allowed her costs, unless the master shall report that the amount in her hands is small, and not more than might reasonably be required to cover her necessary expenses in managing and winding up the estate, and in the absence of such report I should think that each party should bear their own costs at any rate up to the present stage. Looking at the

uncertainty of the grandson's existence, at the expense of serving him with process if he be alive, and according to my judgment, at the *prima facie* absence of any well founded claim by him upon the administratrix, it would be unreasonable to tie up the residue on his account; still as one of the judges thinks he has rights under the will, it seems proper and fair for the husbands of the several legatees to give their joint and several bond to the administratrix before the residue shall be divided, to indemnify her against the claims of the grandson.

There should be a reference to the master to take account of estate, of disbursements made by James Winser on Burnt Island property, and of the interest and profits the residue has been earning in the hands of administratrix or under her control, and the bill should be retained for further directions on master's report, and on question of costs.

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HON. MR. JUSTICE HAYWARD:

This bill sets out a will made in 1860, by the testator, whereby he bequeathed specific legacies, principally of monies, to his wife and children, and amongst the rest, to his son, John, a money legacy. and also his property at Exploits Burnt Island, and by his will the testator directed "the remainder to be divided between the parties." John, the son, died intestate, before the testator, leaving no children, by which his legacy became lapsed. The complainant, Amelia Ann, received her specific legacy under the will and prays for distribution of the residue.

Defendant sets forth in her answer, that she has certain moneys of the testator for distribution, but as regards the property at Exploits, it was at the time of testator's death in possession of James Winser and Mary his wife, (the daughter of testator) and that the said James Winser laid out large sums of money thereon, and claimed the property as his own; also, that testator left him surviving a grandson, William Gibbons, (not named in the will) and defendant prays the direction of the Court, whether the said grandson is not entitled under the will to participate in the residue.

James Winser was not made a defendant by the bill, but in order that all matters regarding the estate should be finally disposed of, his name was included by consent.

The two principal questions to be decided are—

1st. Are James Winser and wife entitled to the property at Exploits under the evidence which we have before us, and

2ndly. Do the words in the will "the remainder to be divided between *the parties*," entitle the grandson, William Gibbons, who is not named in the will, to share in the distribution of the revenue, or do "the parties" embrace only the parties named in the will.

Upon the first point we have the evidence of James Winser, that when John Menchinton died in 1863, the testator told him (Winser) that he intended to leave the Exploits property to his (Winser's) wife, and in another conversation that "I have given the place to your wife, and whatever improvements you make are at your own expense, as it is for your own benefit." Winser was then in possession of the property, and upon faith of these conversations, according to his evidence, substantially improved it by building a sunken wharf, two stores, three new flakes, with many other improvements at a cost of about £220. Mrs. Menchinton, the wife of testator, proves that in a conversation with him he (testator) said that he gave Mary Winser the place.

Had the evidence regarding Winser's right to this property rested here, it would be strong in his favor, but yet not altogether satisfactory as to the intention of the testator. Any doubt, however, in my mind, regarding his original intention is removed by a document which is in evidence signed by him before his death in 1866, whereby he bequeathed this same property to Mary Winser, the wife of James Winser. This document was intended by him as his last will, but in consequence of the requisites of the law regarding wills not having been complied with it was not admitted to probate, yet although it could not be recognised as a will it is an evidence of the testator's intentions for all the purposes of this suit upon this point at issue.

Upon the second point, as to the rights of the grandson, William Gibbons, to share in the remainder of the estate, I cannot conclude that the testator intended that he should be a residuary legatee. He gives specific legacies by his will and does not include his grandson by giving him any portion of his estate, and then directs "the remainder to be divided between the parties." Under these circumstances I am of opinion—

1st. That Mary Winser, the wife of James Winser, is entitled to the property at Exploits, and that it should form no part of the remaining estate of William Menchinton.

2ndly. That the words "the parties" only apply to the persons named in the will, and therefore that William Gibbons was not intended to be a residuary legatee, and

3rdly. That the complainants should be decreed their residuary share of the said estate to be settled upon the said Amelia Ann Power and her children.

*Mr. Little and Mr. Kent* for complainants.

*Mr. Whiteway, Q. C.*, for defendants.

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### MITCHELL v. WARREN.

1869, *July*. HON. SIR H. HOYLES, C. J.

*Trespass—Assault and battery—Public officer—Public office—When a plaintiff may be non-suited.*

A went to the office of B, who held a certain public office, to request that a license to search for minerals might be granted to him. B refused to attend to him; angry words passed between them, and B told A to leave his office; this A refused to do and remained insisting on obtaining a satisfactory answer. Upon this B laid his hands on A to remove him, and subsequently sent for a police officer, when A left. In an action for damages for assault and battery—

*Held*—B was lawfully in possession of his office, and A wrongfully remained after being requested to leave, and the assault was committed for the purpose of expelling him. There is no analogy between a common inn and a public office.

In no case can a plaintiff be non-suited against his will, but the objection must be stated at the trial, the reservation of the objection on a motion for non-suit implies a consent to a subsequent non-suit should the Court be of opinion it ought to have been had at the trial.

THIS was an action of trespass for assault and battery, to which the defendant pleaded "that at the time of the alleged trespass he was possessed of certain public offices which the plaintiff had entered a little before the committing of the alleged trespass, and therein demeaned himself with discourtesy and incivility, and disturbed and annoyed the defendant in his said offices, whereupon the defendant requested the plaintiff to cease from so doing and to leave the said offices, which the plaintiff refused to do, and thereupon the defendant gently laid his hands on the plaintiff in order to remove him from the

said offices, doing no more than was necessary for that purpose, which are the alleged trespass.

Upon this plea the plaintiff took issue.

At the trial in December last, the facts as they appeared upon the testimony of the plaintiff and his witness, Redmond, were substantially as follows:

On the 29th of October last the plaintiff called at the office of the defendant, who is Surveyor General of the Colony, to inquire if a license to search for minerals, for which he had applied some nine months before, and for which he had called repeatedly without effect, was ready for him. As he approached the office the defendant passed him on the way from his own office to that of the Colonial Secretary, when plaintiff saluted him and went into the defendant's outer office to await his return. After a few minutes defendant returned and asked the plaintiff in a loud and sharp tone what his business was. Plaintiff said he had come about the license of search, when defendant replied that he could not attend to him, and passed into his private office and seated himself at his desk. Plaintiff advanced to the door of the inner office, complained that he was put to inconvenience and might suffer loss from want of the license, and asked if he could get an answer. Defendant said it was mail day and he had papers to lay before the Council and he could not attend to him. Plaintiff asked several times for an answer, and asked when he should call again, and then said he supposed he should have to call upon the Attorney General again; defendant said he called upon that gentleman two or three times a day. Plaintiff said he had been coming for eleven months, and got no satisfaction. Defendant said some had been coming two years and had got less. Plaintiff went over the questions very often "when shall I call?" Defendant then desired him to leave the office, whereupon plaintiff repeated his question. Defendant then got up, advanced to where plaintiff was standing in the doorway, put his hand behind the plaintiff, and seizing the handle of the door, endeavored to close it, at the same time trying to push plaintiff out of the way. Plaintiff stood as he was against the door, passively resisting, and defendant was unable to close it. Defendant then said "come, come, sir," and seized plaintiff by the neck, endeavoring to remove him, but plaintiff, standing firm, frustrated this attempt also. Defendant loosed his hold of the plaintiff, who then removed from the door which the defendant thereupon closed against the plaintiff. Plaintiff being then in the outer

office, after a few minutes, opened the door and again asked for an answer. Defendant then went out by another door and called a policeman, by whose advice, after some angry words had passed between the parties, plaintiff went away.

At the close of the plaintiff's case Mr. Pinsent, Q C., for defendant, moved for a non-suit on the ground that the plaintiff's own evidence had proved the substantial parts of the plea. Mr. Whiteway, Q C., for plaintiff, contended that the plea put in issue the propriety of the plaintiff's conduct, and that that question was for the jury.

The Chief Justice, after intimating that had the question arisen on the ordinary plea of *molliter manus imposuit* in defence of a dwelling-house, he should, he thought, feel bound to call the plaintiff, said that as the plea was peculiar in its structure in the point referred to by Mr. Whiteway, he would not stop the case, but would give the defendant leave to move thereafter if necessary.

Mr. Pinsent then called the defendant, whose evidence, however, except in contradicting the plaintiff's statements as to a want of courtesy on his part and explaining that the delay in granting the license arose not from any fault in his office but from the pressure of business before the Council, did not differ materially from that given by the plaintiff.

The question sent to the jury was, generally, whether the evidence sustained defendant's plea, and they, after a few minutes consultation, found a verdict for the plaintiff, damages 25 cents. A rule *nisi* upon the points reserved was argued during the present term by Mr. Whiteway for the plaintiff, and by Mr. Pinsent for the defendant.

Mr. Whiteway maintained as a preliminary objection that he could not be non-suited without his consent, and this he was not disposed to give; but the court ruled that he should have stated this at the trial when the presiding judge might have taken another course, and that the reservation of the point raised on a motion for non-suit (nothing being said to the contrary) implied a consent to a subsequent nonsuit should the court be of opinion it ought to have been had at the trial. —4 N. & M., 633, 13 Price, 222 Mr. Whiteway then contended that everyone having business there had a right not only to go into the defendant's office at proper hours but also to continue there at such times until his business was transacted, provided he conducted himself with propriety, and he likened a public office in such case to a common inn in which any one

who paid his bill and did not misbehave had a right to stay if there was room; and that in the present case the propriety of the plaintiff's conduct was expressly put in issue by the plea, and was therefore a material question for the jury under all the circumstances. He cited *Green and Bartland, 4 C. & P., 308.*

Mr. Pinsent, for defendant, maintained that it was not necessary to prove incivility by the plaintiff though alleged; that it was sufficient to prove a request to leave which in law determined plaintiff's right to continue in the office, plaintiff's refusal and the assault in consequence, and that these particulars had been established beyond question by the plaintiff's own statements—*Addison on Wrongs, 484; 8 E. & B. 8; 2 B. & A. D., 663; 1 C. M. & R., 827, 16 C. & P., 492.* He also urged that plaintiff, in going into the private office and there repeating his questions over and over again and insisting upon being answered although told by defendant oftener than once that he was very busy and could not attend to him, was such marked discourtesy and incivility as more than sustained the allegation in the plea to that effect.

After reading the plea and hearing the evidence of the plaintiff, we are of opinion that the questions substantially raised by the pleadings are: Was the defendant in lawful possession of the office? Did the plaintiff, although lawfully there in the first place, wrongfully remain after being requested by the defendant to leave? and was the assault committed for the purpose of expelling him? That upon the plaintiff's own evidence these questions must be answered in the affirmative, and that, consequently, the plaintiff has failed to establish a ground of action and ought to have been non-suited. We hold that there is no analogy between a common inn and a public office; that assuming that everyone having business has a right to enter the latter, the officer in possession has the legal right, subject to the control of the government, to regulate and determine the times, order and manner of conducting business there; and that if for any reason, of the sufficiency of which he must for the time being be sole judge, he finds it inexpedient upon any particular occasion to transact the business of any visitor, he has the right in law to require him to leave, and, on his refusal so to do, to use such force as may be necessary to expel him; that the plaintiff was, therefore, in the wrong in refusing to leave when requested; and that, although if the defendant acted capriciously, or by refusing then to transact his business,

wrongfully occasioned plaintiff an injury, plaintiff would have his remedy by special action on the case, or by an appeal to the executive, or by both courses, as the circumstances might require; he was not justified in taking as it were the law into his own hands and insisting on any business, even though it were only the making of another appointment, being transacted with him after he had been formally required to leave.

The rule must be made absolute.

*Mr. Whiteway, Q. C.*, for plaintiff.

*Mr. Pinsent, Q. C.*, for defendant.

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BAIRD ET AL v. O'NEIL AND WIFE.

1869, *July*. HON. MR. JUSTICE ROBINSON.

*Practice—Judgment by default—Setting aside of—Personal service of writ on defendant—27 Vic., cap. 12—27 Vic., cap. 9, sec. 30.*

On an application to set aside a judgment signed in default of appearance under the 30th section of the Practice Act, 27th Victoria, cap. 9, an affidavit stating the precise nature of the defence is not required, but the ordinary affidavit of merit is sufficient.

Personal service on a defendant of a writ is not necessary in order to sign judgment by default. The service on the defendant's attorney is sufficient to bind the defendant and to satisfy the statute.

I HAVE considered the application and affidavit of Mr. Hogsett and the reasons he has urged to induce me to set aside the judgment by default which the plaintiffs have entered up against his clients, and on which they have charged the defendants in execution; I have also considered the affidavits of Mr. Prowse and Mr. Baird in support of the judgment. I shall dispose of each position taken by Mr. Hogsett *seriatim*.

The writ in the cause was an attachment endorsed for \$443.67; it was issued on 16th October, 1868, was served on Mr. Hogsett, who assumed to act as the general attorney of the defendants, and by writing on the back of the writ he accepted service thereof for the defendants, and undertook to appear and plead thereto as soon as he had sufficient time to communicate with defendants at Buriu.

The plaintiffs, having waited until the 19th of December, 1868, and no appearance and plea having been filed on that day, signed judgment by default for \$457.92, debt and costs, and defendant O'Neil was arrested under such judgment on 26th April instant.

*First*—Mr. Hogsett contends that as no personal service was effected on defendants the judgment against them is worthless, notwithstanding his acceptance of the service of the writ on behalf of them and his undertaking to appear and plead, because the statute 27th Vic, cap. 12, requires a personal service on a defendant. In my opinion there is no foundation, either on principle or practice, for such a position, and I should be sorry if there were. If a party under such circumstances were at liberty to repudiate the act of his attorney, whose authority he does not pretend to disclaim, it would expose the law to contempt and suitors to many evil consequences.

The law in England also requires personal service of a writ upon a defendant, yet it is an every day practice for a defendant to name an attorney who will accept service of process on his behalf and undertake to appear and plead thereto; it would be difficult to find an instance in which such attorney was allowed to repudiate his act. Had the defendant (O'Neil), when made acquainted with Mr. Hogsett's proceeding, denied the authority of Mr. Hogsett to appear as his (O'Neil's) attorney, other considerations would have arisen, and the defendants' position would have been different, but no such disclaimer has been made. The doctrine and practice are laid down in *Arch. Prac.*, 66:—"The general attorney of a person has an implied authority to accept service of process and appear for him." I must, therefore, hold that the service of Mr. Hogsett accepted by him is sufficient to bind his clients and to satisfy the statute.

*Secondly*—Mr. Hogsett in his affidavit states that "up to the closing of the Supreme Court (15th Dec.) he had no opportunity of communicating with his clients, and so informed plaintiffs' attorney that he intended pleading to the said writ in a day or two, and did not do so earlier because, being in the Supreme Court, he believed there was no hurry."

These statements are not very intelligible to me; I do not see how he was in a position to plead "in a day or two" if he had not communicated with his clients, unless he possessed the information he required without any such communication, in which event he should have promptly pleaded long before the lapse of nearly two months; if he did not possess the neces-

sary information he should diligently have availed himself of the opportunities that offered to obtain it, but nowhere does he even allege that he made the slightest attempt to communicate with the defendants from 16th Oct. to 26th April. The affidavit of Mr. Baird convinces me that Mr. Hogsett had sufficient time and abundant opportunity to communicate with his clients; and, if he omitted to take advantage of these opportunities, his clients must bear the consequences. I am of opinion that the plaintiffs were not under any obligation to wait longer than they did before they signed judgment.

As all questions respecting notices and the taxation of costs are waived, I have not considered them; I must hold the judgment to be regular and proceed to consider the defendant's *third* position, viz., that the judgment ought to be set aside to allow the merits to be tried upon the affidavit of Mr. Hogsett, who swears "that he verily believes the defendants have a good defence to the action on the merits." Mr. Prowse, in resisting this, argues, 1st—that on the 26th April, 1869, the defendants are too late to be allowed to set aside for merits, a judgment by default which was signed on 9th December last; and 2nd, that if they were in time, the particulars of the merits should be more fully disclosed to meet the requirements of the 30 section of the Practice Act, 27 Vic., c. 9, which provides "that a judge may within a reasonable time after judgment let in the defendant to defend upon satisfactory affidavits accounting for non-appearance, and disclosing a defence upon the merits."

As to the 1st objection raised by Mr. Prowse, Mr. Hogsett states in his affidavit that he was not aware of any judgment having been signed until defendant was arrested on 26th inst., and he also swears that he told Mr. Prowse that, up to the closing of the last term of the Supreme Court, he had had no opportunity of communicating with his clients. Now, if it be true that he made that statement, and I must assume that it is, because Mr. Prowse offers no contradiction, the judgment was at that time actually signed, and it would have been only candid in Mr. Prowse then to have informed Mr. Hogsett of the fact; if the silence of the former lulled the latter into security he cannot fairly be charged by Mr. Prowse with dilatoriness in moving to set aside a judgment, the existence of which Mr. Prowse was instrumental in concealing; the issue of execution was the next step taken after signing judgment, and on the whole I am of opinion, that the defendants are in time, especially as the plaintiffs have not lost a trial by the delay.

As regards Mr. Prowse's 2nd objection, the language of the section certainly furnishes much to support it, and two out of five of the Barons of the Exchequer in the case referred to by Mr. Hogsett, *Warrington v. Leake*, concurred in the view taken by Mr. Prowse, but the majority of the court upheld the sufficiency of the affidavit there, which was similar to the one under consideration here. I have read the case in full, reported in *11 Exchk 308*; the reasoning of Baron Parke seems to me more forcible than that of his dissentient brethren, and I feel bound to determine that the affidavit in the present case is, on this point sufficient.

The merits of this cause cannot be tried on affidavits, and I think it would be very unsatisfactory to the ends of justice if the defendants should be forever estopped by a judgment obtained in their absence, and should not be let in to have the matters in dispute investigated before a judge and jury. I am willing to afford them an opportunity of presenting their case before that tribunal, but as their present position appears to have been occasioned solely by the want of sufficient diligence on the part of their own attorney, and without any default upon the part of the plaintiffs, the defendants cannot be relieved except upon the usual and equitable terms.

Let the judgment by default and all subsequent proceedings be set aside upon the defendants paying the costs of this application and of the said judgment and execution,—upon pleading issuably instant, upon taking short notice of trial—and upon depositing in Court to abide the result of the suit, the amount of debt sworn to, viz., \$443.67. The defendants being restrained from bringing any action for or on account of the arrest.

In default of a compliance with these terms within forty-eight hours, let my order *nisi* be discharged with costs.

*Mr. Prowse* for plaintiff

*Mr. Hogsett* for defendant.

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1869, *July*. HON. SIR H. HOYLES, C. J.

*Contract—Agreement—Construction—Ship—Part-owner—Right to transfer of share.*

In construing an agreement the Court will give the instrument that construction which will best effectuate the intention of the contracting parties. This intention must be gathered from the terms of the instrument itself fairly considered with reference to the circumstances under which it was executed.

The words "do grant, bargain and sell, and by these presents have granted, bargained and sold," imply a present transfer, sufficient to entitle the plaintiff to a legal transfer of the property assigned.

THIS was an action brought to recover damages for certain alleged breaches of covenants contained in the following agreement:—

Know all men by these presents, that I, Garrett Dooley, of St. John's, in the Central District of Newfoundland, for and in consideration of the provisions and conditions hereinafter mentioned to be performed and fulfilled on the part of James Day, do grant, bargain and sell, and by these presents have granted, bargained and sold, unto the said James Day, of St. John's, aforesaid, master mariner, one-third part of the brigantine or vessel called the *Clara*, at one-third of her present cost; provided that the said James Day, being master and commander of the said ship or brigantine *Clara*, and receiving one-third of the profits of the said vessel and the sum of six pounds thirteen shillings and four pence per month as wages, shall bear one-third of the expenses of the said brigantine or vessel sailing or otherwise, and shall, in the period ending three years from the date hereof, pay or cause to be paid to the said Garrett Dooley the cost aforesaid; and the said G. Dooley and the said James Day, for themselves, their and either of their executors, administrators and assigns, do covenant and agree to perform and fulfil the above provisions and conditions.

In witness whereof, &c.

Dated on the 16th July, A. D. 1867.

Sealed and signed by the parties }  
in presence of

The plaintiff's case was that in the spring of 1867 he verbally agreed with defendant to become part owner of a vessel called the *Clara*, then lately wrecked and lying on the beach at Trepassey; that the defendant purchased the vessel at auction, and that by the expenditure of further monies on his part and by the joint labour of both parties she was got off the beach, brought to St. John's and repaired, and that the verbal understanding previously entered into was then reduced to writing in the foregoing agreement; that in accordance with its provisions he became master of the vessel and sailed her on several voyages until the early part of the winter of 1868, when

the *Clara*, being obliged to put into Carrick-fergus to repair damage sustained on her voyage from Liverpool towards Saint John's, the plaintiff, being unable from severe illness to continue in command, placed another master in charge, and sent her to St. John's, he himself returning to Newfoundland via Halifax; that on the arrival of the *Clara* at her destination in the month of May, the defendant took possession of her and appointed another master, refusing to permit the plaintiff to continue in command, and refused when required to transfer to the plaintiff his share of the vessel, or to account to him for any part of her earnings, or to pay him any part of his wages.

The defence was that the action was premature, and that the plaintiff had forfeited all right, whether as owner or master, by a wilful abandonment of the vessel without sufficient reason, and by misconduct while in command. The action also involved the adjustment of unsettled accounts relating to the freights, expenses and profits of the vessel, and the wages of the master, to which it is unnecessary further to refer.

In his charge the Chief Justice distinguished between the plaintiff's rights *as owner*, under the agreement, and his rights *as master*, and directed the jury that the plaintiff was entitled to a transfer of one-third of the vessel on demand, and to one-third of the profits, from the date of the agreement, irrespective of his conduct as master; and that his right to wages and damages as master would depend upon whether he had, without sufficient reason, abandoned the vessel or had been wrongfully discharged by the defendant.

The jury found a verdict for the plaintiff of \$753.

At the trial, upon a motion for a non-suit and by way of exception to the charge, Mr. Hogsett, for the defendant, contended that no action would lie against the defendant for refusing to transfer the share of the vessel until after the expiration of three years from the date of the agreement, and after tender of the stipulated price; and that such transfer was also dependent upon the plaintiff continuing in the ship and serving faithfully as master during that period; and a rule nisi, granted for the discussion of these points, was argued before the full Court during the present term, by Mr. Whiteway, Q. C., for plaintiff, and by Mr. Hogsett for the defendant.

The questions raised are purely questions as to the true construction of the agreement above recited, and in determining them the Court are, as maintained by Mr. Hogsett, bound to

give the instrument that construction which will best effectuate the intentions of the contracting parties. But this intention is to be gathered, not by means of parol evidence, which is admissible only in certain exceptional cases, of which this is not one, but from the terms of the instrument itself, fairly considered with reference to the circumstances under which it was executed, (*2 Stackie, 928*) and a careful examination of this agreement leaves no room to doubt that the construction put upon it by the Chief Justice at the trial was correct, and that the exceptions taken by the defendant cannot be sustained.

The words in the former part of the contract "do grant, bargain and sell, and by these presents have granted, bargained and sold," plainly import a present transfer insufficient indeed, under the registry law, to pass the legal ownership, but quite sufficient to entitle the plaintiff to a legal transfer if required, and to damages for a refusal to convey; and the right to a third of the ship would, under the agreement, draw with it a right to one third of the earnings and a liability to one third of the expenses. A tender previous to transfer was not necessary, because by the latter part of the contract, three years were allowed to the plaintiff in which to pay the purchase money; and if it had been, the defendant clearly waived performance of such a condition by refusing the information necessary to enable plaintiff to fulfil it.

The continuance of the plaintiff as master at a fixed rate of wages would not be a condition precedent as his duties in that capacity were to be continuous, while as we have seen, the transfer was to be, if plaintiff so required, immediate, and the proviso stipulating for his services amounted in effect only to mutual independent covenants by the one party to employ, and and by the other to serve, for breach of which either party could sustain an action for damages.

The rule *nisi* must therefore be discharged.

*Mr. Whiteway, Q. C.*, for plaintiff.

*Mr. Hogsett and Mr. Little* for defendant.

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286 WHIBBY, A MINOR, v WALBANK, ADMR. OF  
MARY WHIBBY AND JAS. WHIBBY.

1869, July. HON. SIR H. W. HOYLES, C. J.

*Trust—Establishment of alleged trust—Husband and wife living apart—Death of wife, intestate—Interest of husband in wife's estate.*

The deceased for several years before her death was separated and lived apart from her husband with her only surviving child. During the separation the husband contributed nothing towards the support of the wife and child. The child, a son, lived with his mother, and from time to time paid in his wages to her. Deceased at the time of her death had accumulated about \$1,000. A suit was taken against the administrator of deceased by the son who claimed the whole fund, in that it was given by him to his mother in trust for his use, and on the other hand it was claimed by the husband of deceased as her earnings to which he was entitled *jure mariti*.

*Held*—The monies of intestate were partly monies received by her in trust for the use of her son and partly monies earned by her and added to monies given her by her husband and son and as such must be equally divided amongst husband and son.

THE bill in this suit was filed to establish an alleged trust in relation to certain monies in the hands of the defendant, Walbank, as administrator, and to compel the application of the fund to the objects of the trust.

The main facts of the case, as they appear by the pleadings and evidence, are as follows:

In the year 1840 the deceased, Mary Whibby, then Mary Malone, was married to the defendant, James Whibby, by whom she had four children. Of these one died in infancy, another when very young, the third, Michael Anthony, who was the eldest, died unmarried about the age of twenty-six years, and the fourth, the complainant, now in his twenty-first year, alone survives. In 1853 the defendant, Whibby, left his wife, and thence to the time of her decease, in July, 1868, lived apart from her. During the separation Whibby contributed nothing to the support of his family, but he had, as he alleged, supported them previously, and had given his wife a sum of forty-seven pounds or thereabouts in 1847. The complainant always lived with his mother, and paid her all his wages. The deceased, who was a very industrious and thrifty woman, earned money by washing and in other ways, and Michael Anthony also contributed occasionally to the common stock, and from some or all of these funds deceased managed to maintain herself and her children, and to accumulate a sum of about one thousand dollars, which at her death was invested in the Savings' Bank in her name.

The contention between the parties to the suit was as to whom this money belonged. The complainant claimed it as his earnings, by him from time to time given to his mother to keep for his use, and by her deposited in the bank. The defendant maintained it to be the property of his wife, in part contributed directly by himself, in part the produce of her own labors, in part given her by Michael Anthouy, and to all of which he was entitled *jure mariti*.

At the hearing certain points of law were raised and discussed by counsel on both sides, but these we do not think it necessary to consider, because in our opinion the sole question in the case is one of fact to be determined upon the evidence taken in the cause, and that question appears to be: Was the money which is the subject of the suit the earnings of the complainant given by him to his mother to be restored to him or otherwise applied to his use, in which event he would be entitled to recover it from any party receiving it with notice of the trust.—*Lewin on Trusts, 185*. Was it the produce of the labor of the deceased, added to money given her by defendant, Whibby, and by Michael Anthony, in which case the defendant, Whibby, would alone be entitled to it *jure mariti*, (*Stephens Com. 301*) or was it in fact a fund derived from all these sources?

After a careful perusal of the evidence and a consideration of the circumstances in which deceased and her children were placed, we are satisfied that the last hypothesis is the correct one.

There seems no room to doubt that the complainant gave his wages generally to his mother, to be applied, so much as was necessary, for their joint support, and the residue to be laid by for his or their future benefit as occasion might require, and that, after a reasonable and necessary deduction for his expenses, as much would remain as would, as nearly as can be calculated, somewhat exceed half the amount deposited in the bank. It appears also to be tolerably certain, from the complainant's own evidence, that his mother's earnings largely contributed to increase the fund, while it is highly probable that her thrifty and saving habits occasioned the application of some of her husband's and of Michael Anthony's money to the same object.

Under these circumstances the monies in the hands of the administrator must be shared between the complainant and his father.

What proportion should be assigned to each so as to do exact justice between them it is rather difficult to determine, but we

think that the nearest approximation to that result will be found in adopting as our guide the principles upon which the deceased and the complainant themselves acted in dealing with the fund.

They appear to have put their earnings together, to have drawn upon them for their common support (the deceased being in all cases the manager and distributor), and, so far as we can judge, treated them as common property to which each had an equal right, and thus established as between themselves a species of partnership or of joint ownership in them.

Following this example, we are of opinion that after deducting the administrator's charges, which must first be paid, the sum in court should be equally divided between the two claimants, but having regard to the much greater equities on the part of the complainant, who contributed so largely to the common fund as compared with the want of equity on the part of the defendant, who can rest his claim for the most part only upon a rule of law which, though binding upon us, works in this case very hardly, and taking into account that the defendant not only contributed very little, if anything, to the subject of the suit, but unnaturally withheld all assistance from his wife and family for so long a period, we feel we are bound to distinguish between the merits of the one and the demerits of the other in the only way open to us, by indemnifying the complainant against all expenses and subjecting the defendant to the payment of the costs.

We, therefore, direct that the fund in court be applied to the payment, in the first place, of the administrator's charges, and that the surplus be divided equally between the complainant and defendant, Whibby, but that from the defendant's share be deducted the complainant's costs as between attorney and client.

*Mr. Little* for complainant.

*Mr. Kent* for the administrator.

*Messrs. Pinsent, Q. C.*, and *Parsons* for the defendant, James Whibby, senior.

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DICKINSON, TRUSTEE McLEA'S INSOLVENT ESTATE, 289  
v. DIRECTORS COMMERCIAL BANK.

1869, July. HON. MR. JUSTICE ROBINSON.

*Company—Bank—30 Vic., cap. 18, sec. 3—Lien on shares for advances—Title of trustee in insolvency to sell shares not transferred to him.*

Under 30 Vic., cap. 18, the directors of the Commercial Bank are justified in refusing to enter in their books assignments of bank shares owned by parties in debt to the bank. The bank has a lien on such shares until the liabilities are discharged.

Under the Insolvent Law a trustee duly appointed becomes *ipso facto* the owner of the property which at the time of the insolvency belonged to the insolvents.

THIS bill was filed by Mr. Dickinson, as the trustee of the insolvent estate of John B. McLea, Robert McLea and James McLea, trading under the style of "Kenneth McLea & Sons," for the purpose of compelling the directors of the Commercial Bank to register, and thereby complete the sale of eleven shares in the capital stock of the said bank, belonging to the insolvent estate, from the said trustee to Mr. Whiteway.

The bank directors, by their answer, raise several grounds of defence, of which three only need be noticed in our decree.

*First*,—They allege that Mr. Whiteway, as the transferee of the shares, is a necessary party to the suit, and should have been and must be made complainant.

In that position we concur, he is interested in the subject and the result of the suit, and by a general rule of chancery practice all persons so interested should be parties before the Court. We therefore direct that Mr. Whiteway's name be inserted as a complainant *nunc pro tunc*, in accordance with the arrangement made at the hearing.

*Secondly*,—The bank alleges that the trustee himself had no valid title in the shares, and therefore no power to sell them, because he had not been recognized and registered by the bank as the proprietor of McLea's shares.

In that position we do not concur. Under the operation of our insolvent laws, a trustee duly appointed becomes *ipso facto* the owner of the property which at the time of the insolvency belonged to the insolvents, and, stands in their place as fully as an executor represents the estate of a testator; it is the law which casts upon the trustee, such ownership, and the assent of third persons is not required to perfect it.

*Thirdly*,—The bank directors allege, that at the time they were required to register and complete the transfer of these shares to Whiteway, viz., on 21st June, 1867, there were then existing liabilities of the McLeas due to the said bank to an amount far exceeding the value of such shares, and that by virtue of the 3rd section of the 30 Vic., cap. 18, the bank had a lien upon such shares, and therefore refused to enter in their book and register, the transfer to Whiteway until the said liabilities were discharged, as by law they might, and the case of '*The London, Birmingham and South Staffordshire Banking Co.*,' reported in the *Jurist* for 1865, and other authorities, were cited.

It is not necessary for the Court to determine, or even to express an opinion upon the question raised in argument, viz., whether the words in the 3rd section "all then existing liabilities due to the said bank," have or have not the enlarged meaning which the same words, with their context in the 2nd section bear, and embrace debts that, although then existing, were not then payable, upon which question much might be urged pro and con. It is sufficient for us that we here find proved beyond dispute, that ten days previous to the demand on the bank to register the transfer to Whiteway, viz., on 11th June, a bill of exchange for £1300 stg., drawn by the McLea's on the 19th March, at 60 days sight, had been discounted for them by the bank, had come to maturity, had been dishonored and protested, and was at the time, and still is unpaid; there was then a liability both due and payable to the bank by the McLea's, and therefore the bank was by law justified in refusing "to approve, enter and register in their book" the assignment to Mr. Whiteway.

One point more remains to be noticed, a distinction was sought to be raised by the complainant between one share registered in the name of the three McLea's, and the ten remaining shares that were registered in the name of John B. McLea alone, and Mr. Whiteway contended that at any rate the bank had no lien on those ten shares for debt of the whole firm. We think it had; without adverting particularly to the evidence to learn the real ownership of the whole eleven shares, we are of opinion that the claim of the bank extended over all the shares equally. Each member of the firm having been declared insolvent, the property of each and of the whole vested in the trustee, and became liable to be taken to pay the debts of the whole firm and of all its parts.

The bank has been justified in all it has done in this matter. The complaint against it has failed, and the bill must be dismissed, with costs.

*Mr. Whiteway, Q. C.*, for complainant.

*The Attorney General, Q. C.*, for defendants.

# WOODS v. TESSIER.

1869, *July*. HON. MR. JUSTICE HAYWARD.

*Insurance marine—Mutual Insurance Society—Construction of rules—Partial loss—Jettisoned portion of cargo—Rule nisi—Non-suit.*

A vessel insured under the rules of the Mutual Insurance Society of Brigus, on a voyage from Newfoundland to Havana grounded on the Bahama banks, where she remained stranded for some time. It was found necessary in order to save the vessel and cargo that a portion of the latter should be jettisoned.

*Held*—The loss sustained by the owner of the cargo so jettisoned was a "partial loss" within the meaning of the rules of the Mutual Insurance Society.

THIS was an action taken by the plaintiff to recover from the defendants, as members of the Mutual Insurance Society of Brigus, their proportion of a loss sustained by him in relation to his vessel the *Alma*, insured in that society.

It appeared upon the trial, before a special jury, that whilst this vessel was so insured she sailed on a voyage from this port to Havana, and in its prosecution grounded on the Bahama banks, where she remained stranded from eighteen to twenty-four hours in peril of being totally lost; that for the preservation of the vessel and the remainder of the cargo it was necessary to lighten her, and for this purpose there were 556 drums of fish, part of the cargo, thrown overboard, after which she floated and reached her port of destination, and without which she would probably have become a total wreck. It also appeared that the plaintiff had necessarily paid the portion of general average for which the vessel was liable, amounting to upwards of \$600, which amount he claimed from the society under the rules by which he was insured.

The whole points of the case were either proven or admitted, excepting the legal liabilities of the defendants, under the rules, to indemnify the plaintiff against a loss sustained by him under

these circumstances; and whilst Mr. Pinsent, Q. C., on the part of the plaintiff, contended that the society was liable for such average loss, Mr. Hayward, for the society urged that the intention and meaning of the rules and of the parties on both sides were, that the insurers should only be responsible for losses by damages done to the vessel directly, and not those for which she would be liable under average, such as in the present case.

We directed the jury to find a verdict for the plaintiff, subject to the opinion of the Court, as to the liability of the society for such loss, and granted rule *nisi* for a non-suit.

The case came on for argument to-day, the rule relied upon by the plaintiff states, that "each member shall underwrite on each particular vessel the valuation at which she is entered in the society, and bear reciprocally the proportion of any *total* loss that may happen either at sea or in port arising from the winds, seas, rocks, shoals, &c., &c, provided the master has done his duty to prevent the same; and also, of such *partial* loss (if the vessel be stranded at the time of such partial loss but not otherwise) as shall with the necessary incidental expenses amount to &c., &c."

We have considered the points by defendant's counsel, but we can only gather the intention of the parties and the meaning of the rules by the construction of the latter, and the legal and ordinary meaning that the words "partial loss" convey. The goods laden in the *Alma* were thrown overboard for the safety of those that remained and also of the vessel, and had not this expedient been resorted to, the full value insured upon the vessel would have become a charge upon the society. It would appear hard then, that this benefit should be gained to the society at the personal expense of the individual insured, yet we only mention this circumstance to show that the equities in the case are altogether in favor of the plaintiff; which fact, however, has not weighed with us in arriving at a conclusion upon the legal rights of the parties.

We are unanimously of opinion, that the loss sustained by the *Alma*, the subject of this suit, was a "partial loss" within the legal meaning of the rules of the society and covered by her insurance, and we therefore order the rule *nisi* to be discharged.

*Mr. Pinsent, Q. C.*, for plaintiff.

*Mr. Hayward* for defendant.

IN THE MATTER OF THE RULE *nisi* FOR A PROHIBITION AGAINST CERTAIN PERSONS PROFESSING TO BE A COMMITTEE OF THE HOUSE OF ASSEMBLY FOR THE TRIAL OF THE PETITION OF WOODS AND LEMESSURIER, *against* THE SITTING MEMBERS, CARTER AND EVANS.\*

1870, *April*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Evidence—Relevancy—Rule nisi for writ of Prohibition—23 Vic., cap. 11—Trial of controverted elections—Election committee—Mode and time of appointment—Alteration in journal of House of Assembly.*

On an application for a writ of Prohibition against certain persons professing to be a committee of the House of Assembly for the trial of a controverted election under 23 Vic., cap. 11 (the local Act for the trial of controverted elections), it appeared that certain alterations had been made in the journals of the House of Assembly by the clerk under direction from an improperly assumed authority, relative to the period of its adjournment, which alterations stated facts which were admitted to be false, and the truth or falseness of which facts were important as regards the validity of the election committee and its work. On the examination of the clerk of the Assembly, it was proposed to ask him (1), why the alteration in the journal was made, and for what purpose? (2), Who desired the alteration made?

*Held—*(Robinson, J., differing). The questions were not relevant. The main question was the question of adjournment, that having been disposed of there was no right to go into the other matters.

THE Court met about 11 o'clock.

The rule *nisi* had been granted by the Court on a joint affidavit of Messrs. Carter, Whiteway and McNeily, which was in substance as follows:

That a petition from LeMessurier and Woods was presented to the Assembly on the 18th February last against the return of Carter and Evans; that Thursday the 24th February was appointed for the consideration of this petition; that at the time appointed Messrs. Carter and Evans, by their counsel and agents (Whiteway and McNeily) attended the House; that no call of the House having been previously made, the order of the day was read by the Speaker; that strangers were then ordered to withdraw, and Whiteway and McNeily withdrew, and shortly after, with Mr. Carter, went into the clerk's office; that about ten minutes afterwards these three gentlemen were informed by the Solicitor of the House, Mr. A. O. Hayward, that the House had adjourned for a week until Thursday the

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\* Vile judgment in this case, *Post*, May 1870.—[EDITOR].

3rd of March; that Mr. Whiteway on the evening of the adjournment met the Speaker, who, in reply to a question from Mr. Whiteway, informed him that the House had adjourned for a week until Thursday the 3rd of March, and that in the meantime a messenger would be sent to Harbor Grace requiring the attendance of the Conception Bay members on that day; the Speaker at the same time expressed a doubt as to the legality of the adjournment for a week, as it seemed to him in violation of the section of the Election Act requiring an adjournment till the next day; that no step was taken in the matter of the petition from the 24th of February till the 2nd April, when the House, in the absence of the sitting members and of their agents, and contrary to their protest, proceeded to appoint a committee consisting of Thomas Talbot, Peter Brennan, James L. Noonan, James Jordan, R. J. Parsons, jr., Henry Renouf and Francis Winton, who, with the petitioners (LeMessurier and Woods), are the present defendants; that Messrs. Whiteway and McNeily, on behalf of their clients, protested in writing against the proceedings of the House; that Mr. Carter made further and strict enquiry into the matter, and had no doubt whatever that the House did adjourn from the 24th of February to the 3rd of March, and not to the 25th of February, as appeared by the entry in the journals, which entry was contrary to the fact, and that he had no doubt whatever and verily believed that this incorrect and unlawful entry was directed to be made by the Speaker after the House had so adjourned for a week and the members separated for the day; that in corroboration of these facts he (Mr. C.) had required the Clerk and Solicitor of the House to make affidavit of the fact, but that they had refused until ordered by the court so to do, and that he was desirous of obtaining an order for their examination; that Messrs. Carter and Evans were duly returned, gazetted and sworn, and had taken their seats as members for the district of Burin.

The acting Attorney General (Little) shewed cause—first, protesting against the jurisdiction as affecting the privileges of the House of Assembly; secondly, contending that the rule had not been regularly served until Wednesday, when the affidavits were served with it, which would give only three days to show cause.

Mr. Whiteway said there were two objects in the rule, one to stay proceedings and the other to show cause. The rules were served on Tuesday for want of time without the affidavits

(as nine voluminous copies had to be made) to intimate the first object, and on Wednesday they were served with affidavits for the second purpose.

By the Court.—Whether as a matter of right or of favour the Court would, if desired, postpone the hearing. The regular service could only be considered to have taken place on Wednesday.

After consultation Mr. Little determined to go on. He then took some further technical objection to the rule, on which the Court said they were at present against him. The learned counsel then proceeded to show cause upon the law points of the rule, and argued that, even if the House adjourned for a week, there was nothing irregular or contrary to the spirit of the Act, and cited cases. He concluded by expressing a hope that the Court would not suppose that the persons whose names were involved in this proceeding were actuated by feelings of ill-will or intention to commit a wrong. He put in and read an affidavit of Mr. Speaker Bennett, setting forth :

That on the 24th February the order of the day was the consideration of the petition of LeMessurier and Woods, and that the order of the day was not then formally read ; that the parties to the petition had been notified to attend ; that there not being twenty members present, exclusive of the Speaker, the consideration of the petition was not proceeded with ; that the House met on the 25th and adjourned to the 26th February, and so from day to day, Sundays excepted, until the 2nd of April, when twenty members, exclusive of the Speaker, were present, and a committee was appointed ; that he did not direct any unlawful or incorrect entry to be made in the journals of the House with regard to the adjournment of the House from Thursday the 24th of February to Thursday the 3rd of March, nor was he aware of any such entry being made.

At request of Mr. Justice Robinson, Mr. Little read again the portion of Speaker Bennett's affidavit where he speaks of the House meeting.

Mr. Justice Robinson — Defendant says the House met ; there is not a word about adjournment.

Mr. Whiteway then moved for the examination under the statute of the Clerk and Solicitor of the Assembly by way of eliciting the full truth, and showing that an adjournment for a week did in fact take place, and to correct other wrong impressions attempted to be raised by the Speaker's affidavit, and he commented upon the equivocal and evasive character of that affidavit.

The Court ordered the attendance of the Clerk, John Stuart, Esq., and of the Solicitor, A. O. Hayward, Esq., and adjourned for an hour, when, having again sat, A. O. Hayward was examined by Mr. Whiteway: I have been Solicitor of the House since 24th Feb; I was present at the time of the adjournment on that day (evidence objected to on the ground that House was sitting with closed doors). Witness continues: The House was in committee on privilege at time of adjournment; I understood so then and now—strangers had been ordered to withdraw.

Acting Attorney General Little interposes, and says: My Lords, I do admit as a matter of fact that the House did adjourn for a week.

Mr. Justice Robinson.—It would have been very much better had that affidavit of the Speaker not been introduced into a court of justice, and I should not be doing my duty here, especially when you, Mr. Little, as Attorney General of this colony, candidly admit the adjournment, if I did not honestly and conscientiously say so. It was ingeniously done, and the effect of it is to evade the truth and conceal the facts, and you, with credit to your profession, have now repudiated it.

Chief Justice.—The affidavit is curiously constructed.

Mr. Justice Robinson.—Yes! cleverly done; but like all such clever things, sure to fail.

Mr. A. O. Hayward's examination was continued. He deposed to the adjournment for a week. Afterwards he was notified in writing to attend next day, Friday, when the House met. What he meant by the House was the Speaker and some members who attended. He also spoke of certain resolutions as to suspension of rules passed on Thursday and for a call of the House by summons for that day week. The Speaker and some members continued to meet until 2nd April, when the present committee was formed.

John Stuart, examined by Mr. Pinsent.—I am Clerk to the House of Assembly; have been so for twenty-two years; I can't tell if the House met on the 24th of February until I refer to the journals which I have in my hand.

Mr. Little objects to the journals being introduced into the evidence. Mr. Pinsent contends for their use at present as memoranda to refresh witness's memory.

The Court, after asking Mr. Stuart when the journal was made, thinks it cannot be excluded, at the same time intimating to the witness that he need not, unless he choose, answer questions tending to criminate himself.

Mr. Stuart.—The day of the week was Thursday, 24th Feb. It was resolved on that day to suspend the rules of the House on notices of motion. The journals I hold in my hand is the copy to be printed. I take memoranda at the table. These journals are in accordance with the memoranda, but a little more elaborated. On Thursday, the 24th, it was on the order to consider the petition of Woods and LeMessurier against the return of Carter and Evans. The journals say, there not being twenty members present, it was ordered that the House adjourn to to-morrow at four o'clock, and that at half-past four the order on the petition be proceeded with. According to the journals the House adjourned until the next day at four o'clock.

Question by Mr. Pinsent.—Do you swear that all you have read from the journals is correct in fact?

Answer.—No. I cannot swear that it is correct in fact.—(General demonstration in Court, which was crowded with a respectable audience; the Chief Justice said the Court should be cleared if there was a repetition of it.) The original memoranda (now destroyed) instead of stating an adjournment until next day, stated an adjournment for a week. As a general rule I send a copy of the journals to the Governor on the evening of every day if the House rises before nine o'clock. I was engaged out that evening and had not time. Had I pursued the usual course I should have written and sent to the Governor a journal in accordance with the memoranda. I would have sent it according to the order made when the House adjourned. I sent journals not corresponding with the original order of the House.

Question by Mr. Pinsent.—Then the journals you sent to the Governor were as false as those you hold in your hand?

Answer.—An exact copy.

Question.—Why was the alteration made, and for what purpose?

Objected to by Mr. Little, and not allowed.

I am well acquainted with the keeping of journals and parliamentary practice. Knew an occasion in 1852 when the House adjourned to two or three o'clock, and on the Speaker's summons met at twelve o'clock to pass an address on account of great distress suddenly arising from shipwrecks. In this case the entries in the journals exactly corresponded with the proceedings of the House. On the present occasion the entry is different from the fact. I made the present journals on Friday morning and did not alter them without being instructed to do so. The House met on Friday, I mean some members met with

the Speaker, in the Assembly room, three besides the Speaker, viz.: hona. Messrs. C. F. Bennett, T. Glen and T. Talbot.

These are three gentlemen, members of the Executive, who are very often present in the building. There was a call of the House for a stated day, the 3rd of March, according to order made on the 24th February, the day that the House adjourned for a week. The professed committee was appointed on the 2nd of April. The order of the day was read after the call of the House. Several of the members summoned were absent from St. John's and living at a distance. Never except on this occasion have I made an incorrect entry.

Question.—Who desired you to do this?

Mr. Little objected.

The Chief Justice.—I do not think this question is relevant. The main question is the question of adjournment for a week, and whether the meeting of the members from day to day will cure that defect. With regard to that adjournment there have been conflicting affidavits, and in consequence two witnesses have been brought here and examined. They, and the Attorney General's admission, have sufficiently proved that adjournment, and there is now no question about the fact. All that is material to the case, but being disposed of, we have no right to go into other matters. The matter in the Speaker's affidavit is only in reply to matter of inducement in the affidavit of Messrs. Carter, Whiteway and McNeily. I think it was well that the witness should state that the false entry was not made on his own mere motion, but we are only here to obtain material facts, and having these settled we have nothing further to do.

Justice Robinson.—I agree in great measure with my learned brother the Chief Justice. But here a number of questions have been put as to a wrong entry in the journals of the House of Assembly, which is a public body, and the record of which must be of importance to persons. Evidence of fraud can always be introduced to impugn the validity of writings, and I do not see how we can stop short at this point when this question is put as to the alteration of a solemn instrument. It may be said that the Clerk is not the organ of the House who alone could give orders to the clerk. When Mr. Stuart says, I was ordered to make this wrong entry, it seems that if this question be not answered, we are stopping short in a matter with regard to which we have in the affidavits a conflict of testimony. But there is yet another ground in favour of this question being put. Mr. Speaker Bennett has been brought here by his affidavit.

The Court has brought in Messrs. Stuart and Hayward. If the Speaker swears that he did not direct an incorrect or unlawful entry to be made, I think it only just to Mr. Stuart that the question should be put. If on the other hand Mr. Stuart has acted without authority, it is only right that the Speaker should be vindicated. I do not think that any other person except the Speaker had authority to order the Clerk. The Speaker by pledging his oath to a controverted fact has exposed the clerk to a grave imputation. I think that we should have the whole matter out in order that, to use a colloquial expression, "the saddle may be placed on the right horse." I think the question should be confined as to whether or not the order was given by the Speaker, I am of opinion that in this shape the question should be put.

Per Hayward, J.—I agree with the Chief Justice that this question is not material to the present issue. The real question is did the House adjourn for a week? That is admitted. It is no material fact as to who was the authority by which the alteration in the journals was made.

The question was not allowed. Examination continued.

Question.—On the 2nd of April were the parties ordered to attend at the bar of the House? Messrs. Whiteway & McNeily were notified on the 1st of April in writing. I don't swear that the parties were ordered to attend. They were informed that on the 2nd of April the committee would be chosen. This notification was simply one of a series of notifications.

After the close of Mr. Stuart's evidence, Messrs. Whiteway and Pinsent addressed the Court in support of the rule at considerable length, citing numerous cases, contending for the jurisdiction of the Court, and that the words of the Act were clear, precise and imperative, and that to permit an evasion or violation of its provisions might be attended with the gravest consequences. We are unable to give the arguments and speeches of these learned gentlemen in full, but we have no doubt that the judgment of the Court will when delivered set out everything that is necessary for the information of the public.

At the close of the arguments, the Chief Justice said, that this was a very novel and important case and one not to be hastily determined. The laborious argument of counsel and the number of cases cited proved its difficulty and importance as a question of law. His Lordship suggested whether counsel would consent to take judgment in Chambers as none could be

delivered now until 20th of May. Counsel not assenting, His Lordship said, then this case must stand for judgment until the 20th of May, therefore let the rule be enlarged to time.

*Mr. Whiteway, Q. C.*, and the *Hon. Mr. Pinsent, Q. C.*, of Counsel, and *Mr. McNeily*, Solicitor, for the sitting members.

*Acting Attorney General Little* and *Mr. Kent* for the committee and petitioners Woods and LeMessurier.

IN THE MATTER OF THE MOTION FOR A PROHIBITION AGAINST  
HENRY LE MESSURIER AND JOHN WOODS, AND  
PETER BRENNAN, THOMAS TALBOT, JAMES L.  
NOONAN, ROBT. JOHN PARSONS, JAS. JORDAN,  
HENRY RENOUF AND FRANCIS WINTON, *on behalf*  
*of* FRED. B. T. CARTER AND EDWARD EVANS.

1870, *May*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Practice—Prohibition, writ of—Committee of House of Assembly—Enquiry into  
controverted election—23 Vic., cap. 11—Adjournment from day to  
day—Falsification of Journals of Assembly.*

Under 23 Vic., cap. 11, an Act for the trial of controverted elections, a petition was, on the 18th of February, A. D. 1870, presented to the House of Assembly by Henry LeMessurier and John Woods, complaining of the undue election and return of F. B. T. Carter, Esq., and Edward Evans, Esq., for the District of Burin. The 24th of the same month at 4 p. m. was fixed by the House of Assembly for the consideration of the petition. On the said day and at the time appointed, Carter and Evans attended with their agents and attorneys, having duly apprised the Speaker of their attendance. The order of the day for considering the petition was then read, previous to calling the House. The House adjourned for one week, twenty members (the number required for the trial of an election petition) not being present. The Assembly after meeting at the expiration of the week continued to adjourn until the 2nd of April following, when having met it proceeded to appoint a committee to consider the election petition. An application was then made to the Supreme Court on behalf of the sitting members for a writ of prohibition, directed to the petitioners and the committee to restrain the former from prosecuting and the latter from proceeding with the enquiry on the grounds—(1), That the House of Assembly on February 24th, the day appointed for considering the petition,

omitted to call the House before proceeding with the order of the day. (2), That by having adjourned for a week instead of to the following day, the committee were illegally constituted. A rule nisi having been granted, the Attorney General appeared for the petitioners and committee and contended—(a), That the Court had no jurisdiction over the proceedings of the House of Assembly. (b), That the promovents should have appeared before the committee before applying for the writ. (c), That the omission to call the House and the adjournment for a week were irregularities which could not affect the constitution of the committee. (d), That the irregular adjournment of the House, was cured, by the Speaker, officers and certain members of the House meeting each day during the week of adjournment; and (e), That if the committee were illegally appointed, they were consequently not an inferior Court and a writ of prohibition would not therefore lie.

*Held*—(Making the rule absolute). There is nothing in the character or constitution of the inferior Court (the election committee) as emanating from the House of Assembly which limits or restricts the jurisdiction of the Supreme Court over it. The *Lex et consuetudo Parliamenti* itself part of the law of England, has no application to Colonial Legislatures.—(*Kielly v. Carson*.—*Doyle v. Falconer*, followed).

*Held*—The appointment of the committee was contrary to and inconsistent with the requirements of the Statute in that it was imperative and absolute and the very substance of the enactment that the Assembly should adjourn to the next day and not over for a week. There was therefore no committee and no court, and all proceedings under it were null and void. The Speaker, officers and some of the members voluntarily assembling each day during the adjournment had no power in law, political or legislative, and cannot over-rule a former resolution of the House

*Held*—Whenever a body of men with some plausible show of jurisdiction assume to exercise judicial functions whereby the rights of the subject are endangered, a writ of prohibition will go to stay such usurped authority.

THE promovents above named are the sitting members in the House of Assembly for the district of Burin, Messrs. LeMessurier and Woods were candidates at the late election for that district in opposition to the sitting members, and are now petitioners to the Assembly against their return, and the other parties above mentioned are a select committee of the House appointed, as is alleged, for the trial of such petition under the local Act for the trial of controverted elections, 23 Vic., c. 11.

During the last April term of this Court, Mr. Whiteway, Q. C., of counsel for the sitting members, applied for a writ of prohibition to be directed to the petitioners and the members of the committee, to restrain the former from prosecuting, and the latter from proceeding with that inquiry.

The application was based upon the following affidavit:

## IN THE SUPREME COURT.

NEWFOUNDLAND, )  
 St. John's, to wit. )

Frederic B. T. Carter and William V. Whiteway, both of St. John's, aforesaid, Queen's Counsel, and Alex. J. W. McNeily, of the same place, Attorney-at-Law, severally make oath and say, and first, the said Frederic B. T. Carter for himself saith, that on the 18th day of February last a petition from Henry LeMessurier and John Woods, styling themselves as both of St. John's, aforesaid, merchants, was presented to the Honorable the House of Assembly of this Island, complaining of an undue election or return of this deponent, Frederic B. T. Carter and Edward Evans, for the district of Burin, in this Island, at the last general election of members to serve in the House of Assembly, held in November last, at which election the said petitioners were candidates for the district. The hour of half-past four o'clock, on Thursday the 24th day of February last, was appointed by the said House of Assembly for the consideration of the said petition. That at the said last named time this deponent, and the said Edward Evans, by their counsel and agent, the said William V. Whiteway and Alexander J. W. McNeily, attended in the said House of Assembly, of which attendance the Honorable the Speaker was duly apprised. And the said William V. Whiteway and Alex. J. W. McNeily, for themselves say, that on the said last named day and hour they attended in the said House of Assembly as counsel and agents for said Carter and Evans, when the Order of the Day for considering the said petition was read by the said Speaker, Thos. R. Bennett, Esq., the said House not having been previously called; that the said Speaker then directed all strangers to withdraw, whereupon these deponents, the said Whiteway and McNeily, withdrew; and the said Frederic B. T. Carter, Wm. V. Whiteway and Alexander J. W. McNeily, for themselves say, that immediately after the said Whiteway and McNeily so withdrew as aforesaid, these deponents went into the office of John Stuart, Esq., the Clerk of the said House, and remained there for the space of ten minutes, when the Solicitor of the said House, Augustus O. Hayward, Esq., came into the said office and informed these deponents that the said House of Assembly had adjourned until that day week, namely, Thursday the third day of March ultimo. And this deponent, Wm. V. Whiteway, for himself saith, that on the evening of Thurs-

day the twenty-fourth of February inst., about the hour of half past six o'clock, he met the said Speaker, when a conversation to the following purport and effect took place: Deponent asked the said Speaker what had been done in the House, when the said Speaker told this deponent that the said House of Assembly had adjourned until that day week, namely, the third day of March aforesaid, and that in the meantime a messenger would be sent to Harbor Grace to summon the members there to attend upon the last named day; that the said Speaker also told this deponent that he had doubts as to whether they ought not to have adjourned until the next day, according to that section of the Act. Deponent asked "what section?" The said Speaker replied "the section which provides that the House shall adjourn until the next day," but, he then said, "you know 'the next day' in parliamentary language means the next day upon which the House shall sit," or words to that effect. And these deponents, William V. Whiteway and Alexander J. W. McNeily say, that they have protested in writing against the proceedings of the said House of Assembly.

And this deponent, the said Frederic B. T. Carter, saith, that no step was taken as regards the said petition or Order of the Day, from the said twenty-fourth day of February until Saturday the second day of April instant, upon which day the House having met proceeded to appoint a committee of Thos. Talbot, Peter Brennan, James L. Noonan, Robt. J. Parsons, jr., James Jordan, Henry Renouf and Francis Winton, who were, in the absence of this deponent, his counsel and agents, and contrary to their protest, appointed and sworn, as it is said and pretended, under and by virtue of the Act 23rd Victoria, chapter 11, by which Act the said House of Assembly professed to be governed as regards the said petition. And this deponent further saith, that on other further strict enquiry he has ascertained that the said House of Assembly did not proceed on the twenty-fourth day of February last with the order of the day for the consideration of the said petition, or appoint a committee. And this deponent likewise saith, and that from inquiry instituted by him he has no doubt whatever, and verily believes, that the said House did adjourn on and from Thursday the said twenty-fourth day of February last until Thursday the third day of March last, and not until the next day or day following the said twenty-fourth day of February as appears by the entry in the journals of the said House, which entry is contrary to the fact; and deponent verily believes, that the said incorrect and

unlawful entry was directed to be made by the said Speaker after the said House had so adjourned for a week, as aforesaid, and the members of the same had separated for the day. And this deponent lastly saith, that in full corroboration of the circumstances aforesaid, he has requested John Stuart, Esquire, Clerk of the said House, and the said A. O. Hayward, Esquire, Solicitor, to make affidavit thereof, but that they refused until ordered by the Court to do so. That the said parties were present at the proceedings of the said House on the said twenty-fourth day of February, and deponent is desirous that order may be made accordingly for the examination of the said parties before this honorable Court, or as may be directed. That this deponent, and the said Edward Evans, were duly returned, gazetted, sworn, and had taken their seats as members of the said House of Assembly for the district of Burin as aforesaid.

(Signed), F. B. T. CARTER,  
 " W. V. WHITEWAY,  
 " ALEXR. J. W. MCNEILY.

Sworn before me, at St. John's, aforesaid, this }  
 5th day of April, A. D. 1870, by the said }  
 Frederic B. T. Carter, Wm. V. Whiteway }  
 and Alex. J. W. McNeily, }

(Signed), M. W. WALBANK,  
 Commr. Affdts. Sup. Court.

And upon the facts therein stated and under authorities which he cited, Mr. Whiteway contended that by reason of the House having, on the 24th of February, the day appointed for considering the petition, omitted to call the House before proceeding with the order of the day, and of their having, upon finding that there were not twenty members present besides the Speaker, adjourned the House for a whole week, instead of the following day, the committee were illegally constituted, and that as they had taken the oath prescribed by the Act, and were about wrongfully to proceed with the trial of the petition, against the wishes and to the possible prejudice of his clients, this Court ought to exercise the power it possesses over all inferior tribunals, to restrain the committee from further proceedings.

The Court refused to order the immediate issuing of the writ, but granted a rule *nisi* upon the petitioners and the committee, with a stay of proceedings in the meantime. An application was then made by Mr. Whiteway for the compulsory examination

of the Clerk and Solicitor of the Assembly, but this was also refused, but with an intimation, that if the affidavits of these officers were not produced by the other side, the application might be renewed during the progress of the case, should their evidence appear to be necessary for establishing the truth upon any material points in controversy.

Upon the return of the rule, being the last day of the April term, the Attorney General appeared for the petitioners and the committee, and after protesting against the authority of the Court to interfere with what, as he alleged, were the proceedings of the Assembly in a matter of which they alone had cognizance, took a preliminary exception to the rule *nisi* as not being in accordance with the terms of the sixth of the Practice Rules of the Supreme Court, which prescribes that rules *nisi* to set aside proceedings for irregularity shall state in the rule itself the grounds intended to be relied upon.

The Court, however, were of opinion that the sixth rule had reference only to irregular proceedings in the Supreme and Central Circuit Courts, (see also *4 C. B. N. S. 418*), and overruled this objection.

The Attorney General then read the following affidavit of Thomas R. Bennett, Esq., Speaker of the Assembly:—

#### IN THE SUPREME COURT OF NEWFOUNDLAND.

NEWFOUNDLAND, }  
St. John's, to wit. }

Thomas R. Bennett, of St. John's, Speaker of the Honorable the House of Assembly of Newfoundland, maketh oath and saith, that on the twenty-fourth day of February last past, being the day appointed by the said House of Assembly for the consideration of the petition to the said House of Assembly from Henry LeMessurier and John Woods, complaining of an undue election or return of Frederic B. T. Carter and Edward Evans, as members for the District of Burin, in the said island, at the General Election of members to serve in the said House of Assembly, held in November last, the order of the day for considering the said petition was not formally read by this deponent previous to the House being called. That on the said day he, this deponent, being then in his place in the said House and acting as Speaker thereof, informed the said House that the said order could not be formally read until it was found that there were twenty members of the said House present, exclu-

sive of the Speaker, nor the parties to the said petition, or their counsel, were called to the bar. That on the said day and at the time appointed for the consideration of the said petition the said House was called, and it being found that there were not twenty members present, exclusive of the Speaker, the said petition was not proceeded with. That the said House met on the next day, at a particular hour, and it being again found, after a call of the House, that there were not twenty members present, exclusive of the said Speaker, the House adjourned to the following day at a particular hour, and so continued to do from day to day until Saturday the second day of the now present month of April, when the House was again called, and it being found that there were twenty members present, exclusive of the Speaker, the parties to the said petition were ordered to attend at the bar of the House, the doors of the House were then locked and no members permitted to enter or depart, the order of the day for considering the said petition was then read, and afterwards and in the way directed by the Act passed in the twenty-third year of the reign of Her present Majesty, entitled "An Act to regulate trial of Controverted Elections, or returns of members to serve in the House of Assembly," a committee was appointed to try and determine the merits of the said return or election. That the counsel and agents of the said Fred. B. T. Carter and Edward Evans were duly notified of the intention of the House to proceed to the appointment of the said committee on the second day of April. And this deponent further saith, that he did not direct any unlawful or incorrect entry to be made in the journals of the said House respecting an adjournment of said House from the said twenty-fourth day of February to the third day of March last past, as mentioned in the affidavit in this matter made by the said Frederic B. T. Carter and William V. Whiteway and Alex. J. W. McNeily, nor is he aware that any such entries have been made in the said journals, and he further saith that the said journals were read over to, approved of, and confirmed by the said House at its then next sitting.

(Signed), THOS. R. BENNETT.

Sworn to at St. John's, this 9th day of }  
April, A. D. 1870, and before me, }

(Signed), M. W. WALBANK,  
Com. of Affits.

And then proceeded to shew cause to the rule *nisi*, by contending that it should be discharged, on some one or all of the following grounds, in support of which he cited several authorities. *First*,—That the committee being a part of the Assembly itself, and being appointed by that body for the purpose of conducting and determining an inquiry into the claims of certain parties to seats in the House, to prohibit it from proceeding in accordance with the orders of the House, would be an illegal interference with the exclusive powers and privileges of the Assembly, for which no authority or precedent could be found. *Secondly*,—That before applying for a writ of prohibition the promovents should have appeared in the Court below which they had not done. *Thirdly*,—That assuming (what he neither admitted nor denied) that there had been *no* call of the House prior to reading the order of the day on the 24th of February and that the House had adjourned for a week on that day, the omission in the one case and the proceeding complained of in the other, were mere irregularities, which (the words of the Statute being directory only, and not imperative) could not affect the constitution of the committee; and that the irregular adjournment was cured by the House meeting, as was alleged, on the 25th of February, and continuing its sittings by regular adjournments until the day when the committee was appointed, and in support of this position the Attorney General cited an instance from the journals of the Assembly of 1852, in which, after having adjourned from one day until *two o'clock* the next day, the Assembly nevertheless met at *twelve* on that day, by direction of the Speaker, for the purpose of considering of the relief to be afforded to certain distressed sealers. *Fourthly*,—That if, as alleged, the committee was in fact illegally constituted, it was in law no Court at all, that a writ of prohibition would not therefore lie to it, and that the promovents' remedy was to await its action and institute proceedings only when actually aggrieved.

At the close of the Attorney's General's argument Mr. White-way again moved for the examination of the Clerk and Solicitor of the House, and the Court being of opinion, that owing to the ambiguous and unsatisfactory character of the Speaker's affidavit, some doubt existed as to the fact of the adjournment being to the third of March, such examination was ordered.

Upon its being entered upon, the Attorney General, on behalf of his clients, admitted that the adjournment was for a week as alleged; but the inquiry was nevertheless proceeded

with for the purpose of informing the Court of the circumstances under which the House had, as was stated by the Speaker, met on the following day, and it then appeared that on the 24th of February the House was not called over previously to the order of the day being read, that in consequence of there not being twenty members present beside the Speaker, the House had adjourned to the third day of March; that after the House rose the legality of this adjournment was doubted, and that in consequence, the Speaker and certain members (three or four, as deposed by the Clerk, at least ten, but not twenty, as stated by the Solicitor) met the next day at the usual time and place, with the view of correcting this mistake, and continued to meet and adjourn daily until the third of March, from which day the House regularly met and adjourned from day to day until the second of April, when, the required number being present, the committee were appointed. It further appeared that the original notes of the proceedings of the twenty-fourth, as taken officially by the Clerk, correctly stated the adjournment according to the fact, but that the full journals untruly stated that the House had adjourned to the next day, that the journals were so made up by the Clerk, not of his own accord, but by direction of some whose orders he felt bound to obey, but whose names, the disclosure being objected to by the Attorney General as irrelevant, did not appear, and that the succeeding journals to the 3rd March were made upon the assumption of continued regular adjournments of the House from day to day.

After this evidence had been given, Messrs. Whiteway and Pinsent, Q. C., in support of the rule, were heard in reply. The Court reserved their judgment until to-day, and in the meantime they have given this subject full and careful consideration.

The questions raised for consideration, though not of so much difficulty as might at first be supposed, are yet novel and important. Novel, because for reasons presently to be noticed, no case strictly analagous to the present can be found in *English* jurisprudence, and I cannot learn that any of a similar character has occurred in any of the colonies; and important, not only because it is supposed to concern the powers and privileges of the House of Assembly, but also by reason of the interests immediately involved in it, since if the rule be discharged, the sitting members may be compelled to defend their seats before a tribunal in which they profess to have no confidence; while, if it be made absolute, the petitioners may, without any fault of their own, be deprived of the opportunity of having their claim to seats in the Legislature investigated and possibly allowed.

With the novelty or importance of the case, however, we have nothing to do, further than as these circumstances should stimulate us to a more thoughtful consideration of it. Nor may we concern ourselves with the consequences of our decision. Our duty is simply to declare the law as we believe it to be, and in now doing so, it is satisfactory to reflect, that if we should be mistaken in our conclusion, a tribunal is at hand by which our errors may be corrected.

The application which has been made to us is for a writ of prohibition to be directed to an election committee of the House of Assembly, to restrain it and those who are suitors before it from further proceeding with an enquiry into the Burin election.

This writ is defined to be "a writ issuing out of Superior Courts at Westminster, directed to the judge and parties to a suit in any Inferior Court, commanding them to cease from the prosecution thereof, on the ground that the case does not belong to that jurisdiction" (*3 St. Com. 686*), and it is grantable *ex debito justitiæ* (though not of course) upon sufficient grounds.—*Jackson & Beaumont, 11 Ex-Bardell & Veley, 12 Ad. & Ellis*

By the first section of 5 Geo. 4, c. 67, commonly known as the "Judicature Act," the Supreme Court has within this colony and its dependencies the same jurisdiction that the Courts at Westminster have in England. An election committee constituted under the local Act 23 Vic., cap. 11, for the trial of controverted elections being a place where justice is judicially administered (*Coke on Litt. 68*) is undoubtedly a court, and having only a limited jurisdiction (*Mayor of London v. Cox, H. L. Cal. 1067*) is an *Inferior Court*.

It necessarily follows that if in the present case sufficient grounds have been shewn for this writ we are *bound* to grant it, unless as is contended by the Attorney General, there is something in the character or constitution of this Inferior Court, and emanating from the House of Assembly, which limits and supersedes our ordinary authority in this respect.

The case then resolves itself into this enquiry, *Is* our authority here restricted as the Attorney General maintains it is, and if not, have sufficient grounds been shewn for the issuing of the writ?

To consider these questions in their order. An election committee although composed entirely of members of the House of Assembly, chosen and put in motion by that body, is essentially a creature of the law, owing its existence and constitution wholly to an Act of the local Legislature, which declares and defines its functions and duties, and bestows upon it all the

powers it possesses. *Prima facie* then, like all other inferior legal tribunals, it would be subordinate and subject to the control of the law as administered by the Superior Courts. What is there that exempts it from their jurisdiction?

The argument of those who contend for such exemption is, that by reason of its composition and the nature of the subject matter with which it deals, the election of members of the House of Assembly, it is responsible to the Assembly alone, and no other power can lawfully interfere with its proceedings; and it is said that during the whole time (nearly a century) during which the Grenville Acts were in operation, no instances occurred of a prohibition being even applied for against a committee appointed under their provisions, and that in this particular an analogy existed between the Assembly and the House of Commons.

It is to be observed, however, that in *Bruyeres v. Halcomb*, 3 Ad. and E., cited with approval in *Ransom v. Dundas*, 3 Bing N. C., the Court of Queen's Bench reviewed the appointment of an election committee of the House of Commons, chosen under the Imperial Act of Geo. 4, c. 22, on which our Act is substantially based. declared such appointment to be illegal and refused to enforce the decisions of the committee, and although it is true that no case can be cited of a prohibition issuing to an election committee of the House of Commons, that is so because by the *Lex et Consuetudo Parliamenti*, itself part of the law of England, that House has always, and in a manner peculiar to itself, had and exercised the sole and exclusive power of enquiring into and determining upon the election of its own members.—2 St. Com., p 368.

But it has been decided too often to be now a matter of doubt or controversy, that the *Lex et Consuetudo Parliamenti* has no application to colonial legislatures (See *Doyle v. Falconer* and cases there cited, 4 Moore, N S.), and that the powers and privileges of these bodies are such only as either expressly, or by necessary inference, are conferred by the charters, royal instructions, or other instruments to which they owe their origin, or as are given by local enactments in amendment of these instruments (1 Ch. Op. 233-263-296); and I can find nothing in the commission and instructions under which our Legislature was first assembled, or in any of the Acts passed in relation to it, which exempts either the Assembly itself, or any of its committees, from the control of the law or from responsibility for a wrongful act where they exceed their powers; and in the in-

terest of public justice I feel constrained to add, that having regard to the evidence before us of the manner in which the journals of the Asssmbly have been dealt with in this case, and to the danger to which, were such proceedings necessarily tolerated, the rights of individuals might be exposed, it would in my opinion be a very great misfortune if either branch of the Legislature had power to commit a private wrong, and the courts of justice should be powerless to afford redress.

The general principles of the common law then, giving to the Supreme Court jurisdiction over an election committee, and the special exemption from control which prevails for election committees in England, having no existence in this colony, it is manifest that the Attorney General's contention in this respect cannot prevail, and I have now only to consider the grounds upon which our interference is sought.

The grounds relied upon are—that on the 24th of February, the day on which, by order of the House, the petition was to be taken into consideration, the House was not called previously to reading the order of the day; and that upon its appearing that the required number of members was not present, the House was improperly adjourned until the third of March, instead of to the next day; and these grounds depend for their validity upon the true construction of the 5th section of the local Act, 23 Vic., cap. 11, which is as follows:—"Previously to reading the order of the day for considering the petition, the House shall be called, and if there shall be less than twenty members present, the House shall forthwith adjourn to a particular hour the next day, when they shall proceed in like manner, and so from day to day, till there be twenty members present at the reading of such order, in which number the Speaker shall not be included."

While it is admitted as a general rule that powers given by Statute must be strictly pursued, *Vinus ab. title authority—11 Ad. & Ellis 379—3 M. & W. 125*; there is yet a clear distinction between matters merely *directory* and matters *imperative*—*Key v. Loxdale, 1 Burr.* The former, although they ought to be followed, are yet not so necessary as that their non-observance will render void all subsequent proceedings, while matters imperative are such as cannot be dispensed with, without producing that result. To determine whether an enactment is imperative or directory, we must consider the consequences that would flow from disregarding it, whether it is of the essence or the substance of the proceedings or merely formal, and what

appear to have been the intention and object of the Legislature with respect to it.

The Attorney General contends that the directions to call the House, and in a certain event, to adjourn to the next day, are not imperative, and that notwithstanding a mistaken departure from either, the House could at a subsequent time proceed to perfect the committee, and so far as regards the calling of the House, I am at present disposed to agree with him.

The expression "the House shall be called," means, as is evident from the context, not that every member shall be previously summoned, but that the names of those then present shall be called aloud, that it may be certainly known if the number requisite for the appointment of the committee are in attendance. If they are, a fact which may be ascertained with sufficient certainty without a name being mentioned, the object of the Legislature, the securing a competent number from whom to choose, is satisfied, and no possible injury, it seems to me, could arise from their names not having been enumerated aloud. It is not necessary, however, that I should determine this point, because as to the direction to adjourn to the next day, I have a clear and decided opinion that it is absolute and imperative, and of the very substance of the enactment.

This, I think, plainly appears; 1—From a consideration of the importance attached to time throughout the Statute—thus, no petition can be presented after so many days—not only a day, but an hour is fixed for its consideration—if the petitioner is not *then* present, the petition shall not be further proceeded in; 2—From the evident intention of the Legislature that the proceedings upon the appointment of the committee should be continued and uninterrupted; 3—From the implied prohibition against the transaction of any other business while the appointment of the committee is pending; 4—From a regard to the probable difference in the composition of a committee chosen on one day from what it might be if chosen on another in consequence of its having to be chosen from the members present who might not be the same on one day as on another; 5—From the obvious facility with which, by preconcerted adjournments, a committee might be packed, if the time of appointment were in the discretion of the majority present; 6—From the language of the Statute being, with reference to the adjournment "*from day to day*" *de die in diem*, that is, from the day then passing to the day next succeeding, the word being used in its natural, legal sense, which would authorize an adjournment only over a *dies*

*non*, such as Sunday; and, 7—From the fact, that it seems to have been necessary specially to amend the English Act, to enable the House of Commons to adjourn over certain holidays, in the event of the day preceding them being the day of appointment, and of the requisite number of members not being present on that day.

I must therefore hold, that this case comes within the rule laid down in *Ransom and Dundas*, above cited, namely, that if the appointment of the committee take place in a manner contrary to or inconsistent with the essential requisites of the Statute, there is no Court, and the jurisdiction and all proceedings under it fail, and therefore, that the House of Assembly in adjourning to the third of March, committed a fatal error, working what in a suit at law is known as a discontinuance, which terminates the suit; that the subsequent appointment of the committee was invalid; that the taking of the oath of office by its members with the purpose of proceeding to try the case was nugatory, and that all subsequent proceedings had by them would be *coram non jndice* and inoperative.

It is contended, however, by the Attorney General that admitting the adjournment for a week to be a violation of the Act, this error could be and was cured by the Speaker, officers, and some of the members assembling next day at the usual time and place, and continuing to meet from day to day until the appointment of the committee was completed.

No authority was cited for this position, and I have been unable to find one. The only cases at all bearing upon the point are some in relation to corporations pointing to a contrary conclusion—(see 7 B. & C. 695, and 4 Ad., & Eu. 538, whence it appears that a defect in summoning even a single member of those entitled to be present could be cured only by all being actually present and consenting to waive the defect), and a statement in a newspaper brought under our notice since the argument by the parties in this cause, to the effect that the House of Commons was unable to assemble during an adjournment. Newspaper statements, however, are for the most part, too general to be of much value as authorities in matters of law, and cases of corporation-practice depend too much upon the terms of the respective charters of these bodies to be often applicable. In the absence, therefore, of all authority, I have to consider this point upon general principles.

When an Assembly is first elected, it cannot of its own accord meet for the despatch of business; it must be called and assem-

bled by lawful authority, the Governor's proclamation, and so after being prorogued, it cannot again meet without the like authority. The same principle, it seems to me, must apply to adjournments. When being lawfully assembled it adjourns to a future day, the House by a formal resolution declares that it will not meet or transact business until the time named, and discharges all parties from further attendance until then—and when that time arrives it meets and is lawfully assembled by virtue of the order lawfully made at the time of the adjournment.

If the Speaker and any number of members, whether three or a quorum, could by voluntarily assembling in the meantime, reconstitute the House for the despatch of business (and if they could do this for one purpose they could for another, no matter how important) they would in effect rescind and overrule the resolution of the House made when lawfully assembled. But by a rule of law familiar to every student, the authority to undo an act must at least be equal to the authority by which it was done—and the speaker and members would not be of equal authority with the House unless lawfully assembled. Where, then, is the lawful authority to assemble them outside the Governor's proclamation, during an adjournment? The speaker has it not that I am aware of, nor has any number of the members, nor the speaker and members conjointly. It follows that when voluntarily assembled they have no power in law, political or legislative, and consequently cannot overrule a former resolution of the House. In the commission and instructions of our several governors, down to those of Sir Alexander Bannerman, there was contained a clause empowering the Governor to adjourn as well as to prorogue and dissolve the Legislature. No one will contend that if, in the exercise of this power, the Governor had on any occasion adjourned the Assembly, the speaker and members could assemble and proceed with business before the time appointed by the Governor for their re-assembling, as such a proceeding would be in direct violation of the instrument to which the Assembly owed its existence; and in what respect does the legal effect of an adjournment of the House itself differ from an adjournment so made by the Governor? It is not denied that within the law the Assembly has power to regulate its own proceedings, but no rule of the House has been made to authorize the speaker to call the House together under the circumstances here supposed. The solitary precedent cited from the journals of 1852

is not in point, as no private rights were thereby affected, and the meeting of the members before the time fixed for their assembling was in fact but a declaration by the members present of their readiness to vote a sum of money for a benevolent object, and the practical operation of such a power as the speaker here attempted to exercise would be embarrassing and unjust, as the proceedings of the quorum called together at one time might seriously conflict with the proceedings of another quorum composed of different members assembled at another, the rights of absent members would be ignored, and the advantage of a formal adjournment, connecting in time and place each meeting with those preceding and following it, would be altogether lost.

Unless, therefore, I am shown some authority for this position, of a character so weighty as to supersede all reasoning upon it, I cannot assent to it; nor can I concur with the Attorney General when he insists that it was incumbent upon the sitting members to have appeared and pleaded before the committee before applying for this writ. There are, no doubt, many authorities to this effect, but there are also many to the contrary, and in the most recent case upon this point, the *Mayor of London vs. Cox*, above referred to, all the authorities were reviewed, and it was held that where the court below has no jurisdiction over the subject matter of the suit it is not necessary to appear there, and that a party grieved may apply to the superior courts in the first instance. It is not, therefore, necessary to consider the effect of the protest made by Mr. Whiteway against the committee proceeding.

The last objection by the Attorney General was of greater weight, and were this point not *res judicata*, as, after much consideration, I think it is, would, in my opinion, be fatal to this application.

The Attorney General argued that the writ of prohibition could only go to a duly constituted court of recognized powers and authority which had exceeded or was about to exceed its jurisdiction, and that if the committee was illegally appointed it was in fact no court, and Messrs. Carter and Evans only remedy would be by an action at law for any injury they might hereafter sustain by its proceedings. In support of this view the case of *ex parte Death*, 18 Q. B. 647, where a prohibition was refused as against the Vice-Chancellor of the University of Cambridge for alleged illegality in the conduct of an inquiry made by him with a view to putting in force a statute of the University, may perhaps be cited; but the circumstance

that there (the inquiry was purely voluntary) distinguishes that case from the present one, which, in my opinion, falls within the principle of *Chambers and Jennings*, *Salk* 553, and 7 *Mod. Rep.* 125; *Carter and Fireman*, 4 *Mod. Rep.*, 125; and *Bishop of Chichester and Hayward*, 1 *T. R.*, 650; and *The Dean of York*, 2 *Ad. and El. N. R.*

In *Chambers and Jennings*, as reported very briefly in *Salkeld*, an action for words was brought in a Court of Honor, and a prohibition being moved for, Holt, C. J., doubted if there was such a Court, but said that the writ would go to a pretended Court, and in the same case, as more fully reported in 7 *Mod.*, while the legal existence of the Court seems to have been questioned, the prohibition went, not only because an action for words would not lie in a Court of Honor, but because that Court was then held before the Marshall only, and not before the constable and Marshall, as it ought to have been, if held at all—that is to say, a prohibition lay because for one reason the court below was illegally constituted, which is the very ground upon which the present application is based.

This case is referred to as an authority in *Bac. Ab. Com. Dig.*, and 2 *Ad. and Ellis N. R.* p. 30.

In *Carter vs. Firman*, the court were of opinion that a prohibition ought to issue to an inferior court in the city of London, originally constituted for a temporary purpose which had been satisfied some years before, but the jurisdiction of which an attempt was improperly made to revive.

In the cases of the *Bishop of Chichester vs Hayward* and of the *Dean of York*, prohibitions issued to certain ecclesiastical functionaries to restrain them from the exercise, to the prejudice of third persons, of visitatorial powers which they did not legally possess.

These cases seem to establish the principle that a prohibition will go to restrain the colorable assumption of judicial authority, such as that which the committee in the present case are about to exercise and, if so, they dispose of the objection I am now considering.

For all these reasons I am of opinion that this court has the power, which has been ascribed to it, of restraining the committee from further proceedings, that sufficient grounds have been shown for the exercise of that power, and that this rule should therefore be made absolute.

HON. MR. JUSTICE ROBINSON:

In deference to the novelty and importance of the legal questions arising in this case, it seems proper to state the reasons which have influenced my judgment; and before doing so I wish to acknowledge the material assistance I have derived from the arguments and research of the learned counsel engaged in the cause.

To support the plaintiffs' right to a writ of prohibition the following propositions must be established: 1st—That an election committee under the statute either was or assumed to be "an Inferior Court"; 2nd—That the Supreme Court has authority to examine the constitution of such inferior tribunal and to confine its action within the limits of law; 3rd—That the committee now under consideration has not been created in pursuance of the statute, and is, therefore, inoperative.

It is true that the application for a writ of prohibition to an election committee has not been supported by any direct precedent, but it should not on that account alone be refused; in every series of decisions there must be a beginning, and the first must be determined, as we desire to determine this case, by the application of general principles. It may, however, be observed that, since the beginning of the present year the Court of Queen's Bench in England issued to the Bridgewater election committee a mandamus, which is a kindred writ to a prohibition, and did so unhesitatingly, although its authority to interfere with a parliamentary committee was questioned by the Attorney General of England.

Reference was made at the bar to some alleged privileges of the House of Assembly of the colony which the action of this court, in granting a rule *nisi*, was supposed in some way to have invaded; but what those privileges are, or how the House was at all affected by our interference was not shown. As, however, the matter has been mooted, I think it would be unbecoming to evade an expression of our opinion upon it, and, without in the least desiring to abridge the legitimate power of the legislature, I would observe that I am not aware of the existence of any privileges or immunities which the law confers upon either branch of our Colonial Legislature beyond those enjoyed by all legally constituted bodies who meet for a lawful purpose, and pursue it in a lawful manner.

Both Houses of the General Assembly possess, as incident to their existence, all rights necessary for the due discharge of

their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago—(*Kidly vs. Carson*)—and has been affirmed by several other decisions in the same high Court of Appeal, has denied and for ever set at rest the pretensions which once were raised by Colonial Legislatures that, under the assumption that the "Law of Parliament" applied to them, their will was law, and their proceedings were unexaminable by the Superior Courts. It is altogether visionary to imagine that any Legislative Assembly, body or person possesses under British rule supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legislatures does not claim for itself any such power, for, in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage:—"No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature."—*Todd's P. G.*, 260.

It is unnecessary to advert to the inherent authority which the House of Assembly might have exercised in conducting its own internal proceedings with relation to its own members alone and in determining the right of persons to sit within its walls, provided no Act of the whole Legislature had limited that authority and prescribed a particular mode of procedure with reference to controverted elections, and as such an Act has been passed, it regulates the business of the House, and to its requirements that body and all persons in the colony must, of necessity, conform.

The statute to which I refer was passed in 1860, and is entitled "An Act to regulate the trial of controverted elections, or return of members to serve in the House of Assembly."

This Act was framed upon the model of the Grenville Act, many of the provisions of which it adopted; it prescribes the time within which petitions must be presented, the mode in which recognizances must be perfected, the method by which a committee of seven members shall be constituted, and the manner in which such tribunal—when duly constituted—shall discharge its functions. It directs that the members thereof shall be sworn "well and truly to try the matters of the petition, and a true judgment give according to the evidence." And it invests the committee with the power to summon witnesses, administer oaths, hear counsel, and "make a final determination upon the matter."

If there had been no precedent upon the subject I should have held that such a committee—when created in accordance with the statute—would be to all intents a court of justice, and being a court of exceptional character, acting in a manner different from the course of the common law, would be what is technically termed “an Inferior Court,” and, as such, would immediately become subject to all the incidents that attach to courts of that description. In *May's Parliamentary Guide passim*, and in *Ransom vs. Dundas*, 3 B. N. C., such a tribunal is expressly recognized as a court.

*Second*—Now one of the incidents of all Inferior Courts, of what nature soever in England, is that they are subject to the superintending control of the Queen's Superior Courts at Westminster, whose especial duty it is to take care that such Inferior Courts keep within their bounds—6 Ba. Ab., 583; and where such courts are proceeding, or assume the right to proceed, in a matter, or in a manner in which they either never had any jurisdiction at all or have exceeded that which they had, a prohibition may be awarded.—6 Ba. Ab.; *Byerly vs. Windus*, 6 D. & R.

It is also an indispensable ingredient in the very existence of an Inferior Court emanating from an Act of Parliament that the essential requirements of such an Act be strictly observed, otherwise there is no court at all, and everything done by it is *coram non judice* and a mere nullity.—*Bruyere vs. Halcomb*, 5 N. & M.; *Ransom vs. Dundas*, 3 B. N. C.

Such being the law in England, the question arises does the Supreme Court here possess the same powers as the Superior Courts there? and this will be determined by a reference to the Imperial Statute which established this court. The 5 Geo. 4, cap. 67, authorized the King to institute a Superior Court of Judicature in Newfoundland, and declared that it should be called “the Supreme Court,” and should be “a court of record, and should have all civil and criminal jurisdiction whatever in Newfoundland as fully and amply to all intents and purposes as Her Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery in England have, and the judges of the said Supreme Court should respectively have and exercise the like powers and authorities in Newfoundland as any Judge of any of the said Courts, or as the Lord High Chancellor of Great Britain hath or exercises in England.”

Pursuant to that Act a Royal Charter instituted this Court with the jurisdiction and obligations aforesaid, and has imposed

upon the judges thereof the duty of entertaining and determining the question now before us. Nor is this a novel assumption, for, so far back as the year 1720, I find it authoritatively affirmed in *2 Chal. Op. 209*, "that the power of granting writs of prohibitions is one which may be and constantly has been exercised by the Superior Courts in the colonies."

*Third*—The last point that remains for consideration is—whether the committee has been brought legally into existence? If it has, we have no power—from anything that as yet appears—to interfere with it in the discharge of its functions; if it has not, it possesses no functions to discharge.

A brief examination of the statute will shew what necessary preliminaries are prescribed, and how far an observation of days and times in the procedure of the House to constitute an election committee is made essential.

The first section directs that when a petition complaining of an undue election, &c., shall be presented, an order shall be made by the House appointing a *day* and *hour* for the consideration thereof, and at such time the petitioner shall appear under penalty of the order being discharged. The 2nd section limits the time within which recognizances shall be perfected, under penalty of the dismissal of the petition.

The 5th section directs that *on the day* appointed, previously to the reading the order of the day for considering the petition, the House shall be called, and if there be less than twenty members present, exclusive of the Speaker, the House shall forthwith adjourn to a *particular hour the next day*, when they shall proceed in like manner, and so on from *day to day* until the requisite number of members shall be present, when the committee shall be drawn, &c.

How far this carefully prescribed order of procedure has been observed is a matter of fact, and will be seen by the evidence laid before the Court in the affidavits of the plaintiffs' agents, in the admission of the Attorney General on behalf of the defendants, and in the viva voce examination of Mr. Stuart, the Clerk, and of Mr. Hayward, the Solicitor of the House, by which the following details are established—That the day and hour appointed by the Assembly for taking into consideration the petition of Messrs. LeMessurier and Woods against the return of Messrs. Carter and Evans, was Thursday, 24th Feb., at half-past four o'clock,—that there were not on that day twenty members present, and on the fact being ascertained the House resolved itself into a committee of privilege, and directed a "call"

for 3rd of March, and ordered that the petition be taken into consideration on that day;—that, having doubts about the next step to be taken, the members took counsel together and then adjourned the House to the 3rd March—that the Clerk made an entry at the time in his usual manner, upon memoranda, of such adjournment to the 3rd March, and of such order to take the petition into consideration on that day, from which memoranda he is in the habit of transcribing the proceedings into the journals of the House, but did not do so on that evening, nor send a copy of such proceedings to the Governor, by reason of an engagement, but he stated, that if he had not been so engaged, he would have written the journals conformably with the truth, and would also on that evening have sent a true copy to the Governor—that, on the evening of Thursday, or morning of Friday, it was ascertained that the House should on Thursday have adjourned to the “next day,” and not for seven days, whereupon recourse was had to the following expedient; the Clerk was ordered to exclude from the journals the entry of the adjournment on Thursday for a week, and to substitute in lieu thereof an entry declaring the House had adjourned to the following day at four o’clock, and had ordered that the election petition should be proceeded with at half-past four o’clock on that day; he produced in Court the journal containing these fictitious entries, and he frankly admitted that they were untrue, but that he had made them under orders; he also stated that he had transmitted to the Governor a copy of them, purporting to be the actual proceedings of the House.

It did not transpire in Court by whom such orders were given, but the fair inference is that they proceeded from some authority whom the Clerk was expected to obey, and it did appear that on Friday afternoon at four o’clock the Speaker and three other members of the Assembly, whose names were mentioned, met in the Assembly rooms (the Solicitor said he thought there were five or more) when the erroneous journal was read and approved by those present; and this subsequent ratification was equivalent to an antecedent command and sufficiently identified the authority, that—the Speaker and members, assuming to be the House, adjourned to the next day, and some members continued to meet and adjourn in the same manner, from day to day, until Thursday, 3rd March, when the House met,—that the members were then called pursuant to the order made on the preceding Thursday, and the requisite number not being present, the House adjourned until to the next day, and so on

day after day till 2nd April, when twenty members beside the Speaker being present, the order of the day to take the petition into consideration was proceeded with, and the election committee now under consideration was drawn, reduced and sworn—that Messrs. Carter and Evans were notified to attend, but did not do so, and had protested against the proceedings as irregular and void.

It does not appear that the House at any time repudiated the acts of its four members, or corrected the untrue journal; those, therefore, who tacitly acquiesced in such acts may be considered willing to divide the responsibility incurred thereby, but their acquiescence cannot rectify any error in relation to the adjournment.

I do not believe there was an intention of injuring any one by that adjournment. I think it arose from mere inexperience and in itself involved no dishonor, but for good or for evil it stands a confessed fact and cannot be varied. By no alchymy can a week be transmuted into a day. All the expedients resorted to seem to me only trifling with the matter. It is to the actual condition of things we must apply the law, and the question for our determination remains,—What legal effect had that adjournment for a week, instead of for a day, upon the constitution of the election committee subsequently drawn?

The plaintiffs contend that it was a substantial and fatal variance from the Statute. The defendants contend, on the contrary, that it was an immaterial mistake, speedily discovered and practically remedied.

The proceedings of the House in relation to the journals, as detailed in the evidence, are matters upon which—in their moral aspect—I have no need to express my opinion, because they do not affect my decision; but they possess a legal significance to this extent, that they demonstrate the sense entertained by the House itself of the consequences of adjournment for a week when they have had recourse to measures so extreme to avert them.

In my judgment a strict observance of the days and times prescribed by the Act, was intended to be, and has been made compulsory; it is reasonable that such should be the case; amidst the rivalry of parties, each striving for the mastery and neither knowing whose turn might first come, it was to be expected that the consent of the whole Legislature should be given to denude the representative branch of all discretionary power to postpone the consideration of election petitions, and

that an adjournment from day to day until justice should be done, would be rigidly imposed. The language used in the Statute to express these intentions is plain, it is the same substantially as was used in the Grenville Act. and so strictly was that Act construed that Statutable permission was required to enable the House of Commons to adjourn over Sunday, Christmas Day and Good Friday, when either happened to be "the next day."

The Attorney General, feeling the force of this enactment, submitted that the concurrence at the Assembly room of the Speaker and a few members already referred to, was practically a meeting of the House, and a compliance with the law. To that proposition I cannot for a moment assent; it is alike opposed to principle and to practice. An adjournment is a public and solemn act of the whole body done in its collective capacity. It is one which is jealously guarded and not delegated to any subordinate authority,—not even a committee of the whole, although every member might be present, can adjourn the House—and when once adjourned to a certain day there is no power in this colony, except by the agency of a prorogation, that could legally convene it on an earlier day. A Statute was passed in the 39th year of Geo. III. to enable that Sovereign, by Proclamation, to convene the English House of Commons in an emergency, upon an earlier day than that to which it had adjourned, but no corresponding enactment is in existence here.

That three or four members, voluntarily meeting at a time different from that appointed by the House, and it might be secretly, behind the backs of other members, could—by calling themselves "the House"—override the deliberate action of the whole body previously adopted in open session, is a doctrine that, if tenable, would involve consequences of the gravest, most dangerous character. I do not believe it has the slightest foundation in law, but as it has been openly propounded I will cite a few authorities upon the subject. In *Tom., L. D.*, adjournment is defined to be "a putting off until another time, and the substance of it is to give license to all concerned to forbear their attendance *till such time.*" In a corporation, which is a body possessing functions analogous in some respects to those of a Colonial Assembly created by Royal authority, corporate business can only be transacted at corporate meetings; and in *4 Co. Dig. Franchise, F. 33*, a case is reported wherein a Burgess was removed for continuing in court and attempting to make an order "after the court had adjourned."

In the *Mayor of Carlisle's case*, 1 Str. 385, it was determined by the Court of King's Bench, in England, that the mayor and aldermen must meet in their distinctive capacity to enable them to discharge a duty they were empowered to perform, and although they were all present in another meeting, yet could they not then and there execute their functions; an irregular adjournment of a court of justice is sometimes fatal to a proceeding before it, and it was solemnly decided by the High Court of Parliament in Lord Delamere's case, 4 Har., St. S., that an unauthorized adjournment, even by that supreme tribunal, would render 'all proceedings after such adjournment void.'

To one other argument urged by the Attorney General I will briefly avert; he asked, if this committee be no court at all, why should this court take any notice of it, and issue a writ to prohibit its action? The answer seems to be that whenever a body of men, with some plausible show of jurisdiction, assume to exercise judicial functions whereby the rights of the subject are endangered, the Queen, who is the fountain from which alone all justice in the realm flows, will, through her Superior Courts, stay such usurped authority by granting a prohibition, as Lord Chief Justice Holt did to a "pretended court" in Sir John Jennings's case, 1 Salk.

The defendants contend that whatever may be the strict law the parties litigant before the House have not sustained any practical damage from the error of the Assembly; however I might perhaps agree with them upon that point, there may possibly be a different opinion entertained by the plaintiffs, but be that as it may, a court of justice cannot speculate on such points. We are bound by the law and cannot dispense with its provisions. In all such cases a suitor may claim that, if he is subject to the penalties, he should also be entitled to the protection of a statute, and I can discover no reason to warrant a denial of such claim. The case *Freeman vs. Trainer*, 12 C. B., cited at the bar, is in point where, in a case of admitted hardship, the court would not, because it could not properly, strain the law to afford redress even upon a point of practice.

*Lastly*—It may be said why interdict the proceedings of this committee until it has done some act to the prejudice of the plaintiffs? The answer is that no man is bound to wait to be injured where peril is plainly impending. Moreover, the mere fact of a court that possesses no jurisdiction over a question

assuming to exercise judicial functions therein, is of itself a wrong against which the law will protect the party concerned by a prohibition.—*Byerly vs. Windus*, 7 D. & L.

It has been objected that the House did not observe the prescribed mode of procedure on being called over “previously to reading the order of the day,” and that it transacted other business and did not “adjourn forthwith.”

Upon the first point there is some conflict of evidence, in which conflict the House is, in my opinion, entitled to the benefit of the doubt, upon the legal maxim “*omnia presumuntur rite acto*.” Upon the second point I am not satisfied that, under our statute, which in this respect differs from the Granville Act, the House might not legally have transacted some routine business before adjourning.

My conclusions from the whole case are that the adjournment for a week was a substantial violation of the statute; that the meeting of the Speaker and some members on intermediate days was illusory and utterly inefficacious; that the subsequent proceedings of the House to constitute an election committee were null and void; that the supposed committee had, therefore, no legal existence, and its attempt to exercise jurisdiction was an unlawful assumption of judicial functions to the possible prejudice of the subject which this court, being moved thereto, is bound *ex debito justitiæ* to prohibit. In reference to this case, I say advisedly *ex debito justitiæ*, for whilst it is incumbent upon the judges of a Supreme Court of Judicature to administer justice and maintain truth to all persons and at all times, it is in an especial manner a sacred duty imposed upon them to interpose the shield of the law between public bodies and private individuals whenever judicial power is illegally claimed by the strong over the weak, and sure I am that if such a tribunal did not exist and was not ready whenever necessary to exercise its authority with independence, it would be recreant to the trust confided to it; neither person nor property would long be respected, legal rights would be speedily assailed, and civil society would soon lose those characteristics which every one living under British law has a right to expect.

The plaintiffs are entitled to the writ of prohibition, and the rule should be made absolute, but, in my opinion, without costs, because it would not be just or proper to impose them upon Messrs. LeMessurier and Woods, who were only pursuing their rights and had done no wrong; nor upon the supposed commit-

tee, who were compulsorily put into action by the House of Assembly; nor upon the House of Assembly, because they are not parties before the court.

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HON. MR. JUSTICE HAYWARD:

This application for a writ of prohibition came before us during the last sitting of this court.

It was fully argued by counsel on both sides and evidence was produced in support of the allegations set forth.

The application being a novel one and many important points and principles involved, we took time for due consideration and investigation, with a view of arriving at a conclusion and delivering a judgment which we believe to be fully borne out by law under all the authorities bearing on the subject.

After such consideration, carefully given, I arrive at the same conclusion as that expressed by my learned brothers of this court, that the committee of the House of Assembly, for the trial of the case between the parties to this proceeding, was not appointed or constituted according to law, and, therefore, that it is the duty of this court to restrain them from proceeding in the trial of the election petition by granting a writ of prohibition for that purpose.

I do not, in this judgment, intend to enter fully into the statement of the case submitted by the parties or the particular points of law bearing upon it, as, since my return from holding the term of the Northern Circuit Court at Harbor Grace, I have had the opportunity and benefit of pursuing the decisions of the Chief Justice and Judge Robinson, reduced by them to writing and I could only repeat in mine, if I enlarged, that which they have so fully and clearly stated and expressed.

Agreeing, therefore, as I do with them in every particular in the law bearing upon this case, I am of opinion that the rule *nisi* should be made absolute.

*Mr. Whiteway, Q. C., and Mr. Pinsent for promovents.*

*Hon. Attorney General (Mr. Little) for committee of House of Assembly and petitioners.*

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1870, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Trover—Seals panned on the ice-fields—Reducing into possession—Abandonment—Recovery—Salvage—New trial—Misdirection.*

In an action for trover brought to recover the value of one thousand seals, alleged to have been wrongfully taken at the seal fishery, it appeared that the plaintiffs crew, having killed large quantities of seals, sculped, panned and flagged the same, some being cut open and others left round. Owing to the shifting of the ice, the seals thus secured were carried away from where the plaintiff's vessel lay and brought near that of the defendant, whose crew took the seals sought to be recovered on board.

The jury found for the plaintiff.

On a rule nisi, for a new trial it was contended that the jury were misdirected in that the judge should have told the jury that if the plaintiffs crew had no present power to recover the seals, their right of property in them had been lost.

*Held*—(Robinson, J., differing). By killing the seals and reducing them into possession by sculping, panning and flagging, the plaintiffs, through their crew, had obtained an absolute property in them which could not be diverted without their consent. Nor is it necessary to secure and continue the possession originally obtained by taking the seals on board, all that is required for the acquisition of an absolute property in animals *feræ naturæ* are killing and seizing. Killing without seizing, that is, taking possession, would not avail to establish property.

THIS was an action of trover brought to recover the value of a thousand seals, alleged by the plaintiffs to have been wrongfully taken from the crew of their vessel, the *Brothers*, at the ice in the spring of 1869, by the defendants, Kane and his crew, and subsequently sold by Kane to the other defendants, Baine, Johnston & Co.

The facts of this case, so far as it is necessary to refer to them for the determination of the questions now under consideration, are as follows:

On Saturday the 17th of April last plaintiffs' vessel, the *Brothers*, Barbor, master, lay jammed in the ice in Green Bay, a few miles from the land, and, seals being numerous between the vessel and the shore, the crew were sent out to kill them. Defendants' (Kane's) vessel, the only one then in sight, was also jammed in the same ice and lay about eight miles S. S. E. of the *Brothers*. Plaintiffs' crew killed, as they computed, about 3,000 seals, of which some were sculped and piled, some were cut open, and others were left round. One hundred and fifty were taken on board in the course of the day, and a flag

was set up to mark the place where the rest were to be found, which was about two miles from the vessel. On the following Sunday, Monday, Tuesday and Wednesday, plaintiffs' crew continued to haul their dead seals, bringing on board about three hundred each day; but, upon Wednesday, the ice and the vessels shifted their positions so as to remove the seals further away from the plaintiffs' vessel and to bring them much closer to Kane's. On Wednesday Kane's men did not interfere with the dead seals, but on Thursday, the *Brothers* being then about four miles from them and Kane's vessel being in their midst, the crew of the latter vessel occupied themselves all day in hauling them on board their own ship. The crew of the *Brothers* also went to the seals on that day and brought one small tow on board, but, partly on account of the distance and the difficulty of hauling, and partly because, as they supposed, Kane had secured what remained, did not return for a second tow. On the next day, Friday, there occurred a change of wind and an opening of the ice, which would have enabled the *Brothers* to reach the pans where they had left their seals, but her captain did not proceed thither, being under the belief that none remained on the ice, and shortly after both vessels returned to St. John's.

The defendant (Kane) admitted having taken, on Thursday and Friday, about six hundred and forty dead seals on the ice in question, but contended that some of these had been killed by men from the shore, and that what he had taken of those killed by Barbor's crew were for the most part round and scattered, and could not have been recovered by the plaintiffs' men, and that he, the defendant, had, therefore, the right in law to take them and appropriate them wholly to his own use.

The jury were directed by the court to say: *first*, whether the plaintiffs' servants had killed any seals, and by taking measures to identify and recover them by the use of flags, by sculping, piling, cutting, marking, or such like means, had reduced them into possession; *secondly*, if so, whether defendant (Kane) and his crew had taken any of these seals. If they had, the jury should find a verdict for the plaintiff—1st, for their whole value if taken unnecessarily, that is, wrongfully, the plaintiff's crew having the power of recovering them if not meddled with; or, 2ndly, for the whole value, less salvage, if taken necessarily, that is, to save them from total loss, the plaintiff's crew having no power to recover them.

To this ruling, Mr. Pinsent, for the defendants, excepted that the jury should have been told that if the plaintiff's crew had no power to recover the seals their right of property in them had been lost and the verdict should be for the defendants; that there was no proof of a joint conversion as against the defendants, Baine, Johnston & Co.; that the present plaintiffs were entitled to sue for half the seals only; and that there was a misdirection in telling the jury that the only custom proven applied to a scattered round seal, and in not directing the jury that the valuation should have been estimated in relation to the circumstances, and that if there were a mixture or confusion of the plaintiffs seals with those of others without distinguishing them, there would be no right of property as against the defendants.

The jury found for the plaintiffs for \$952 by a special verdict, by which they declared that in their opinion the plaintiffs had not the power of recovering the seals at the ice.

A rule *nisi*, founded on the above exceptions, was heard and argued during the present term, and of this rule we have now to dispose.

As regards all of these exceptions after the first the judges are *unanimous* in holding that they cannot be sustained. The sale of the seals by Kane to Baine, Johnston & Co. was a joint act of the defendants, inasmuch as there could be no vendor without a vendee, and this joint act being an illegal dealing with the property of another, was a joint conversion—see *Roscoe*, 612; the evidence of custom, except so much as established what was not disputed, that a seal abandoned at the ice might be taken possession of by the finder, only went to show the illegal and conflicting practice of two or three sealing masters—the value of the seals was rightly estimated as that which prevailed at the time of the conversion—*Read vs B. Fairbanks*, 16 B., 692; there was no evidence to raise the question of loss of property by intermixture, and the plaintiffs being the absolute owners of one-half of the seals and having a special property in the crew's half, and a right of present possession of the whole, if only for the purpose of distribution, had a right of action for the recovery of all that were taken.

The first exception, as involving a principle of great practical importance in the prosecution of the seal fishery, and as one upon which a diversity of opinion appears to exist, requires a more particular consideration. It maintains that the jury should have been told, in opposition to the ruling at the trial,

that if, after killing these seals and dealing with them in the manner described, the crew of the *Brothers* had, by the shifting of the ice or the chances of wind or weather, been prevented from finally getting them on board their vessel, the seals returned to the common stock and became the property of the first finder who chose to appropriate them. To this position I am unable to subscribe, as it is, in my opinion, unsound in principle and unsupported by authority, and I am constrained to hold, after much consideration and some research, that the direction given to the jury on this point is the only one that can be sustained. This direction was in effect, that by killing the seals and reducing them into possession in the manner described, the plaintiffs, through their crew, had obtained an absolute property in them, and would be entitled, subject in a certain event to the payment of salvage, to recover them from any person into whose hands they might afterwards come.— This statement comprises two positions: first, that the killing, seizing and dealing with the seals by piling, sculping, &c., in other words, reducing them into possession vested *an absolute property in them* in the party so killing and dealing with the seals; and secondly, that the property once absolutely vested could not be divested out of the owner without his consent, except by certain exceptional causes having no application here.

For the first position I cite the following authorities. In *2 St. Com. p. 81*, it is said:—"With regard to animals, *feræ naturæ*, all mankind had by original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters; and this natural right still continues in every individual, unless when it is restrained by the civil laws of the country. By the laws of this realm accordingly, all persons may on their own lands or in the seas, in general, exercise this right, and when a man has once seized animals of this description they become, if reclaimed or confined according to the doctrine laid down in a previous chapter, his *qualified* property, or if dead are absolutely his own, so that to steal them or otherwise to invade this property is, according to the nature of the nature of the case sometimes a criminal offence, sometimes only a civil injury." So in *Blackstone, vol. 2, p. 403*, "and when a man has once so seized them, (i. e., animals *feræ naturæ*) they become while living his *qualified* property, or if dead are absolutely his own"—50, *2 Tomlin's Law Dictionary*, citing under the head "Property," *Dalton 371—Finch 176—11 Reports, 50 Raym, 16*—"one may have an absolute property in things of a

base nature, as dogs, but not in things *feræ naturæ*, unless dead," and in *Bacon's Abridgement*, vol. 4, p. 1, Title "Game," it is laid down generally, that animals *feræ naturæ*, belong to the parties taking and killing them in the *same manner as any other chattels*.

"From these authorities it is plain that when a person at the ice kills a seal and seizes it, that is, takes manual occupation of it, or in other words reduces it into possession, of which seizing, the marking, sculpting, piling, or other acts showing the exercise of dominion and control over it, would be indisputable evidence, it becomes his absolute property—he can lawfully sell it, give it away, cut it up, or throw it into the sea, as he might any chattel he had brought from the shore—it ceases in short to be *feræ naturæ* and becomes a mere inanimate chattel, subject, like all other chattels to those rights and incidents which attach to inanimate personal property, one of which is the right of recovery from any third party who, (the right of property not being diverted) obtains possession of it without consent of the owner."

2ndly,—As regards the divesting of the property, once absolutely vested—to contend that a person would lose or be deprived of his right of property in dead seals which he had piled on the ice, while awaiting an opportunity to take them on board his vessel, by a whirl of the ice or a change in the wind or the weather, carrying them out of his reach, is to say that any accident which may happen to deprive him of the *possession* of his property will deprive him of all *right to it*. For such a position I venture to think no authority can be found in the books. If a man lose his purse or his coat (and I have shown that as regards *the right of property*, no difference exists between one inanimate chattel and another, he is thus deprived of the possession, the profitable use, and beneficial enjoyment of it, but his right of property in it remains unaltered, and any one who finds it must restore it. Where is the authority which declares that with the possession, or the power of recovering possession, the right of property also departs? On the contrary, the authorities are the other way, thus in *2 Bl. p. 9 & 1 St., Co. p. 149*, it is thus laid down: "Property both in lands and moveables being thus originally acquired by the first taker, it remains in him by the principles of universal law, till such time as he does *some other act which shows an intention to abandon it*, for then it becomes *publici juris* once more. So if one is possessed of a jewel and casts it into the sea, or a highway, this is such an express dereliction that the property will be vested in the first

finder—not so if he hides it and it is discovered, there the finder acquires no property, and if *he loses* or drops it by accident, it cannot be collected from thence, that he designed to quit the possession, and, therefore, in such a case, *the property still remains in the loser, who may claim it again of the finder.*

Further, in the second vol. of the same work, where it treats of the various modes by which property may be acquired, I find none enumerated except such as depend upon the will of the owner (assignment, for instance), and those already referred to as inapplicable, namely, by operation of law, as by forfeiture, seizure under process, sale in market overt, &c. I find no head of title by finding, except in cases of abandonment,—abandonment not, be it observed, of the search or of the hope of recovery, but of the right of property. In the present case, however, there was not only no evidence of abandonment, but the whole of the plaintiffs' case went to show there was no abandonment. The only questions, therefore, for the jury, as regards the plaintiffs' right of recovery, were: 1st—had the property in these seals vested in the plaintiffs a compound question of law and fact, to be determined by the application of the law as stated by the court to the facts, of killing, sculping, piling, &c., if found by the jury; and 2nd—had the defendants taken them? If so, the probability that the plaintiffs could not have recovered them from the ice became immaterial except in considering the amount of damages where it received full effect in the direction to allow salvage, and this exception consequently fails.

In his argument on the rule *nisi*, Mr. Pinsent seemed to contend that the means mentioned in the charge "killing, sculping, &c." did not form or constitute that reduction into possession which is necessary to create property in animals *feræ naturæ*, and that it was also necessary for this purpose that the first taker should be in a position to secure and continue *the* possession he had originally obtained, by taking the seals on board his vessel, or, at least, by having the ability to do so, the accidents of the sea notwithstanding.

Neither of these conditions, however, are prescribed as essential by the authorities which I have cited, and with the exception of two local decisions, to which I shall presently refer, none of those mentioned by Mr. Pinsent sustain his position, as they all relate to *living* animals, as to which it is not denied that they can only be the subject of a qualified property which terminates with their escape.

Thus, the passage in *2 Bl., p. 14*, "all these things, so long as they remain in possession, every man has a right to enjoy without disturbance, but if once they escape from his custody, &c.", plainly applies to the live animal having the power within itself of escaping, and not to the dead carcase which may be lost but cannot escape; so with the passage in *Tomlin*, "If a swarm of bees light upon a tree they are not the owners of the tree till covered with his hive"; so with the whale cases in *1 Taunton*. And the analogy attempted to be drawn between bees once hived flying away and escaping though pursued by the owner, who thus loses his qualified property in them, and dead seals, floated away by the ice, fails on the same ground. In the live animal the possessor had a *qualified property* only, which ceased when it escaped. In the dead seal, an inanimate chattel, he had an *absolute property* which accidental loss or wrongful deprivation of his possession could not affect. The case of *Young vs. Hickens, 6 Q. B.*, is one in which the plaintiff had neither property nor possession in the fish, the subject of the action, they being not only alive but at liberty; and the injury done consisted, not in depriving him of property already obtained, but in preventing him from acquiring it.

The only conditions required by the authorities for the acquisition of an absolute property in animals, *feræ nature*, are *killing and seizure*—to insist further that the taker should have the power of permanently continuing in possession, or should not be subject to accidental loss, or should take the property on board his ship, seems to me to be requiring conditions unknown to the law, conditions purely arbitrary, since with as much reason might it be required that the seals should be brought into port as that they should be taken on board ship, as they are exposed to the perils of the sea and the chances of loss in one case as well as in the other.

It by no means follows, however, as Mr. Pinsent further contended, that under shelter of the principle excepted to by him, it would be competent for any person to go upon the ice, and by "slaughtering right and left," establish a property in the seals he killed, thus depriving others of them while he could not retain them for himself. Merely killing without seizing, that is, taking possession, would not avail to establish a property; one cannot obtain the property in a flying gull by simply shooting it from the deck of a ship, nor in a seal by shooting it on a pan to which he cannot obtain access; but if in addition to the killing, he expend time and labor in obtaining corporal

possession of the dead animal, he will then have acquired an absolute property in it, which it would be hard that he should be deprived of by accidental loss.

The same principles would, of course, govern the case put during the argument of the whale supposed to be killed off the Western Islands, and subsequently picked up in St. Mary's Bay. If the whale was killed merely, and not seized or taken into possession, the killer would have no claim on the finder, but if in addition to the killing he had taken possession of it, its accidental loss would not deprive him of his property, but he would be entitled to claim it, subject to salvage, in like manner as he could claim a bale of goods washed off the deck of his ship or cast overboard in a storm.—2 Bl. (557 Abbott, 8k. 410).

Much reliance was placed by Mr. Pinsent upon the alleged fact that in actions heretofore brought in our courts for the recovery of seals wrongfully taken at the ice, the plaintiff's right to recover was made by the judges to depend upon the probability of his recovering his seals had they not been interfered with, and that this circumstance was generally made an important point in the plaintiff's case.

Had the question now under consideration ever been formally raised, argued and determined before the full court, and decided as Mr. Pinsent contends it ought now to be, it would even in such case, having regard to the important effect such a decision would have on the right of property in one of the great staples of our industry, be a very grave question whether if clearly erroneous it ought not to be over-ruled, as in a matter of such moment, where a sound *ratio decidendi* would be of more importance than uniformity in error, it would certainly be our duty rather to correct than follow the mistakes of our predecessors, if such they were.

No such decision of the full court, however, can be cited, and I am of opinion, judging from my own experience, which though differing I believe from my learned brother judge, Robinson's, seems to me to be confirmed by the only reported cases I have been able to see, that Mr. Pinsent's statement in this respect was much too broad.

Assuming, as Mr. Pinsent contends, that the *power* of recovering the seals at the ice was a condition precedent to the plaintiff's *right* of recovering in the action, it ought to have been expressly put by the judge to the jury in every case; but if, as Mr. Carter contends, and as I think rightly, this power

was of importance only in relation to the damages, it would only be put by the judge when expressly raised on the defence. In the former view the question would always arise, in the latter for a different purpose very frequently, for the contest in seal cases having been almost invariably as to the taking by the defendant (a charge denied by him and affirmed by the plaintiff), the power of recovery would naturally be mooted in the course of the trial, not merely in relation to the damages, but because the fact of the seals having been taken by some one would best be established by shewing that the plaintiff's crew recovered the pan on which they had been piled, a piece of evidence which would for the most part establish the power of recovery.

The cases to which I have had reference, with the exception of *Power v. Jackman*, and *Noel v. Warren*, cited by Mr. Pinsent, seem to me to support this distinction,

Thus, in *Stone and Dwyer*, two questions only were sent to the jury by Chief Justice Brady. 1st, Were they satisfied the plaintiff's crew killed and piled the seals in question; and 2ndly. Did any of the defendants take any of these seals? Nothing was said by the judge as to the plaintiff's power of recovering the seals, nor was it made a point of by the defendants, whose sole defence was a denial of the taking. In this case the pan was recovered by the plaintiff's crew.

In *White v. McBride* before the same judge, the seals appear to have been shot and left on the ice, and on a motion for a non-suit the question was raised as to the plaintiffs having reduced the seals into possession and so as to obtain property in them, which was reserved for further discussion, but the jury finding that the defendants did not take the seals, the question raised was not of course brought up again, and nothing was said at any time as to the power of recovery.

In *Power v. Jackman* the position for which Mr. Pinsent now contends was distinctly raised (as would appear) by him as a ground of defence. In his charge Mr. Justice Little, although in the first instance laying it down in accordance with the authorities, that by killing the seals, sculping and piling them, the plaintiff had reduced them into possession, certainly put the ability of the plaintiff to recover his seals to the jury as a condition precedent to his right to recover in the action. Several exceptions were taken to the charge, but what these were does not altogether appear. It must not be overlooked that if the plaintiff, who alone would be interested in excepting to the

charge upon the point now in debate, did take such exception, the finding of the jury in his favor for £133 would of course supersede it.

In *Noel v. Warren*, before the same judge, it does not appear whether any exception was taken or point raised on the ruling, which was as follows: "If a party had killed, sculped, piled and marked, or done such acts as to establish ownership in the seals, and had not abandoned them, any person taking them would be liable in this action, but if he left them scattered about without reasonable hope of recovery it would not be so."

In this case also the plaintiff had a verdict, and therefore no further proceeding was taken; and it is also conceivable that in any similar case the facts might render such ruling unimportant, by establishing beyond doubt the ability of the plaintiff to regain his seals, in which event exceptions to the charge might not be taken.

These two cases, subject to the observations I have thought it right to make upon them, certainly go to support Mr. Pinsent's position, and as judicial decisions they are doubtless entitled to much respect, but being cited with the object of influencing our judgment in the matter we have now to decide, it is our duty, particularly if they are questioned, to test them by the application of legal principles, and after, for myself, applying this test, I am unable for the reasons I have detailed to concur in them.

Whether the other judges, both cases being in the Supreme Court, approved of this direction does not appear. If they did, it would seem to have been without hearing counsel upon the principles involved in it, and under the disadvantage inseparable from trials at *nisi prius* of being obliged to come to a hasty conclusion upon perhaps difficult points of law, without reasonable time or opportunity for reflection or investigation.

The present case then, being the first within my experience, in which the defendant, avowing the taking of the seals, rests his defence upon this ground, and brings it before the full court for deliberate determination, comes to us as one *prima impressionis*. It has been well argued at the bar, and after full consideration I am clearly of opinion that in an action of trover for seals taken at the ice, it is in law no defence to say that if not taken by the defendants the plaintiff in all probability could not have secured them.

In pursuing this inquiry I have had no regard to the supposed expediency or equity of either of the rules contended for,

because considerations of that kind, although sometimes useful in aiding the construction of a doubtful statute by throwing light upon the intentions of the Legislature, are apt in other cases unduly to bias the mind of the judge, whose only duty it is to discover what the law is, whatever may be its character, and having found, to declare it.

I cannot, however, accept the suggestion that the law, as I hold it to be, would be either inexpedient or unjust; on the contrary, I believe that it best accords with sound principles of public policy and with natural equity.

Panned seals, drifted out of the possession of the owner, would *not* be left by third parties falling in with them to float away and become lost to the general wealth of the community, merely because the right of property was preserved to the original taker. The certainty of a liberal salvage, and the probability of their never being claimed, would always be sufficient inducements to the finder to bring them into port.

Nor would actions at law be multiplied by reason of the original taker of lost seals instituting proceedings against every one who might bring in seals which he himself had not killed. The difficulty of identification in such cases, and the fear of costs, would sufficiently restrain such speculative litigation.

On the other hand, by making the right to recover in an action dependent upon the probable ability to regain possession, the title to such property would be rendered precarious and uncertain by being based, not upon matter of fact, but upon matter of opinion; while at the ice a sense of insecurity and a feeling of suspicion and mistrust would be engendered on the part of its possessor, and the desire for the fruits of another's industry on the part of less fortunate neighbors which would not tend to promote those kindly feelings, and that respect for each other's rights which ought to actuate men engaged in the same pursuit, particularly a pursuit so hazardous as the seal-fishery; and a strong temptation would be held out to crews at the ice to appropriate panned seals under any circumstances, since if their possession were afterwards successfully questioned in a court of law, they would lose, besides costs, nothing that they ever owned, while their chance of retaining their plunder would be greatly increased, as it might easily be made contingent upon their being able to satisfy a jury that reliance should be placed upon their opinion of the inability of the plaintiff's crew to regain possession.

It is true this temptation would also exist if the inability to regain possession could only affect the amount of damages, but it would exist in a comparatively trifling degree, and cases of wrongful taking and consequently actions on that account would be less numerous, and where resort was necessarily had to legal proceedings, the taking would frequently be admitted with a view to salvage, and much of that conflict of testimony which we sometimes find and which is so painful to witness would be avoided.

As a matter of equity the plaintiff's better position cannot I think be questioned. The principle for which the defendants contend would altogether deprive the plaintiff's crew of valuable property, on which they had expended much time and labor, and about which they had incurred great personal risk, solely because by an accident beyond their control they were unfortunate enough to lose their possession of it, and would give it to the defendant who had not labored for it, and whose whole merit consisted in taking it on board their ship when it was brought by the currents within their reach. The *true* principle, regarding this property as a common fund created by one party and saved by the other, would recognize the just claims of both and give both compensation for their labor, by sharing the fund between them. What could be more just or reasonable?

Judge Hayward concurring in opinion with me, this rule must be discharged.

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HON. MR. JUSTICE ROBINSON:

After the best consideration I can give this subject, I cannot arrive at any other conclusion than that the rule for a new trial should be made absolute on the ground of misdirection in two particulars, and on the ground that one of the principal issues raised by the pleadings, viz., whether the plaintiffs had property in the seals, was determined by the Court and was not submitted to the jury.

The action was brought to recover damages for the wrongful conversion of the pelts of certain seals which the plaintiffs allege they had killed, and sculped, and left on the ice several miles from their vessel during the last seal fishery.

The defendants filed two pleas, 1st, denying that they had taken the pelts; and 2nd, denying that such pelts were the property of the plaintiffs.

Actions similar to the present have been common in our Courts. I have been engaged in the trial of many both as counsel and judge, and, up to the present, I do not remember and cannot find a report or record of a single one, in which it was not the ruling of the Court that to vest in the plaintiffs such property and possession as would enable him to recover, he must satisfy the jury not only that he killed the seals, but that they continued under his control, that he had not abandoned the intention to return, and the hope to recover them, and that he had a reasonable prospect of being enabled to take them into his complete possession by putting them on board his vessel if the defendants had not interfered with him.

Whether such direction was coeval with the seal fishery, or whether it arose after the usage thereat had been proved and established and therefore had become settled law which judges are bound to notice judicially, or when or how it arose I cannot say; this much I can assert, that during my experience at the bar and on the bench, embracing a period of forty years, such was the law invariably laid down by the Court. I do not recollect one instance in which it was questioned, no record of any exception to that ruling is produced (although in every case it was obviously the interest of one side or the other to have challenged it if erroneous) but the law has, up to the trial of this case, so far as I know and believe, been acquiesced in by judges, bar, and suitors, and has regulated the procedure of the Court.

Mr. Pinsent, in his able argument, has referred to the reports of two trials similar to the present, that were published in 1858, and they are conformable with my experience of the law heretofore administered in such cases, whilst none have been cited to the contrary.

On the trial of this cause, last term, I proposed to adhere to the ruling thus established, and to deliver to the jury the following direction, which I wrote at the time:

“Plaintiff entitled to recover if he reduced into full possession any seals which Kane afterwards took, and plaintiff reduces seals into such possession by

1st. Killing them.

2nd. By taking measures to identify and recover them by sculping, cutting, marking, piling or such like means.

3rd. By not abandoning the hope of recovering, and intention of returning to them, and

4th. By being able to get them on board if not prevented by Kane.

First question.—Did Kane take any seals of plaintiffs so circumstanced? If yea, verdict for plaintiff for their value.

Second question.—If none, verdict for defendants."

My learned brethren, however, were of opinion that from the elements which constituted the plaintiffs' property, should be excluded their intention to return, their hope to recover and their power to secure the seals on board; holding that their property became absolute by merely killing the seals; and they also determined that the jury might, under a certain contingency, allow the defendants salvage.

Such being the opinion of the majority of the Court, the direction to the jury was given in the words written by the Chief Justice, as follows:

"First question is: Did plaintiff kill and reduce into possession, by taking measures to identify and recover them by the use of flags, by sculping, piling, cutting, marking, or such like means?

Second.—If so, did defendant take any of these seals?

Third,—If both questions answered in the affirmative find for plaintiff.

1st, for whole value if taken unnecessarily, i. e., plaintiff having power to recover.

2nd, for whole value, less salvage, if taken necessarily, i. e., plaintiff having no power to recover."

The jury, on this direction, found a verdict in favor of the plaintiffs for \$952, adding, that in their opinion the seals had been lost by the plaintiffs, and were taken by the defendants when the plaintiffs had not any power to recover them at the ice, and that the jury had made in their verdict, an allowance to the defendants on account of salvage.

To unsettle the law which a long and uninterrupted series of decisions had established, can hardly fail to occasion confusion and injury in a commercial community, and the present case furnishes a striking instance of the effect of such disturbance. Under the former ruling of our Courts, the facts here found by the jury would have resulted in a verdict for the defendants, whereas in consequence of the new interpretation of the law, they result in a verdict for the plaintiffs.

In my judgment the former ruling was correct, and it is the latter interpretation that is erroneous, not only by reason of the Court ignoring the usage of the seal-fishery which had

ascertained the facts requisite to constitute ownership of seals at the ice, without taking the opinion of the jury as to what other facts are requisite, but also by reason of the Court introducing the question of salvage in relation to damages.

To dispose of this last point first—

It is observable that the defendants did not prefer any claim in the nature of a set-off for salvage, such a claim has never been recognized in seal cases before, and in an action of trover a set-off is not admissible at all. There is only one way in which a claim for salvage could, in such an action, properly arise, namely, as a bar to the plaintiff's right to recover, but that was not the way in which it was here put to the Court, if it had been the result must have been different, for a plaintiff cannot recover in trover, unless he had, at the time of conversion, the right to immediate possession, as well as the property—*Roscoe* 638; but the plaintiffs here had no such right to possession by reason of the defendant's claim upon the seals for salvage—"an action of trover will not lie to recover wrecked goods before tender of expenses."—*Hartford v. Jones, Lord Ray, 393*)—the action therefore was premature, and the defendants were entitled to a non-suit, or to a verdict—2 *Sel. Np. 1353*, instead whereof, the verdict is for the plaintiffs, but for a sum less than they are entitled to, if they are entitled to any, and the defendants are condemned in the whole costs of suit for not delivering up property which they had a lien upon and a legal right to retain.

It may be said that this was a short method of doing justice, to speak colloquially, a rough and ready mode of effecting an equitable arrangement between the parties. I am quite convinced that such an arrangement was contemplated, but I doubt the success, and I question the correctness of the proceeding; it is not one which could properly have been introduced in the present case, because the Supreme Court of Newfoundland is bound to administer justice on the same principles that prevail in Westminster Hall; the defendants in an action at law are restricted to legal pleas, they must shape their course by established practice, and expect to have their rights disposed of by the rules of law. It has been seen how a departure from strict law has operated to the prejudice of both parties, and it seems to me that the importation of hypothetical equity does not mend the matter, for I am unable to discover any equity in making one sealer—who secures animals *feræ naturæ* found adrift upon the ocean abandoned by the killer, and lost to all

the world,—pay any portion of their value—to another sealer who, although he killed them, had failed, through the ordinary casualties of the fishery, to secure the possession of them, and was obliged, however involuntarily, to abandon the pursuit of them.

It has been asked, would it not be fair to allow the man who killed the seals some benefit for his labor? Reading the present by the light of the past I venture to say, no. What he did was not for the benefit of another but of himself; he acquired no right whatever to these wild animals until he secured possession, (except the right of uninterrupted pursuit). When he was compelled to abandon them they again became common property, open to all; he who lost them with them lost his labor; he who captured them took them free of all lien, for *liens* pre-supposes actual possession.—*Kinlock v. Craig*, 3 S. R.; *Taylor v. Robinson*, 8 Saunt.

For these reasons I am of opinion that the direction to the jury, on the subject of salvage, occasioned a miscarriage of justice, and amounted to a misdirection of law.

The other misdirection appears to me to have been in the judges undertaking to prescribe the facts necessary to constitute ownership in seal pelts drifting about upon floating ice.

By the 2nd plea the fact of ownership was expressly denied, it is the province of a jury to find facts, and when found the judge must apply them to the law. Ownership is therefore a mixed question, compounded of facts and law, and in many instances it is settled by usage. The course pursued in English Courts with reference to whale cases has been to leave a jury to ascertain what facts, by the usage of trade, constitute the right of possession in the whale; the like course ought in my opinion to have been followed in this case, since it was determined to abandon the usage that had heretofore been recognized; but instead thereof the Court assumed that certain acts would establish ownership of seals on the ice, rejecting what I understand to have been the ancient usage that had hitherto been our guide, and ignoring the province of the jury to find any other in its place.

Ships from the United Kingdom, from the United States and Newfoundland are now engaged in the seal-fishery, and it is very desirable that the rule of law which governs the practice of such fishery should be well defined, and as I am so unfortunate as to differ in opinion from my brother judges, as they do from their predecessors, I wish to explain the ground upon

which my judgment rests. It seems to me a radical error to place wild animals and domestic animals in the same legal category, because the distinctions between them are many and material, and arise from the fact that the latter are the absolute property of some person indefeasible except by his own act, whilst the former are, by nature's law, common to all, and are only the subject of a qualified property dependant for its acquisition upon special circumstances, and liable to be lost by accidental causes.

I find the law upon the subject thus laid down in *2 Black C*—389, and adopted by the recent and very learned commentator Mr. Serjeant Stephen: "In animals of a tame nature such as horses, sheep, &c., &c., a man may have an absolute property as in any inanimate thing, but in animals *feræ naturæ*, a man can have no absolute property," "he may be invested with a qualified, but not an absolute property in all creatures that are *feræ naturæ*, by reclaiming or so confining them within his own immediate power that they cannot escape and use their natural liberty,"—*p. 390*. "These are no longer the property of a man than while they continue in his keeping or *actual possession*," and the author gives an example in the case of bees, "which are *feræ naturæ*, but when hived a man may have a qualified property in them," and Bracton adds it is occupation, i. e., hiving and including them that gives the property in bees, "though a swarm lights upon my tree, I have no property in them till I have hived them, a swarm which flies out of my hive is mine, so long as I can keep it in sight, and have power to pursue it." Substitute the word "seals" for "bees" and the word "vessel" for "hive" and we have the present case, *mutato nomine, de te fabula narratur*.

Mr. Serjeant Stephen, in his commentary, *1 vol. p. 165*, whilst treating of the usufructuary property which a man has in light, air, water, goes on to say, "such also are the generality of those animals that are *feræ naturæ*, which so long as they *remain in possession* every man has a right to enjoy without disturbance, but if once they escape from his custody—though without his voluntary abandonment, it naturally follows that they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

It is contended that the right is altered by the death of a wild animal, that when once it is killed it becomes the absolute property of the killer, and for that contention a dictum in Blackstone, adopted also by Stephen, is quoted, but with all

respect I do not think that such dictum refers to the seal-fishery, or has any relation in principle to the question now under consideration—to cleave to the letter without regard to the spirit of a quotation, is what Lord Coke condemns in the maxim, “qui hæret in litera hæret in cortice.” When Blackstone speaks of a hunter converting an animal, *feræ naturæ*, into his absolute property by killing it, he simply means that the hunter thereby gets it into his full possession and control—he chiefly refers to the case of an animal on land, where its death would prevent the probability of its being lost to the killer, and to cases in which the death of the animal is the consummation of the enterprise, but in the seal-fishery of Newfoundland every one knows that killing the seal is only one of several steps in the process of reducing its pelt into possession, no doubt it is the first, then follows sculping, then hauling over the ice, (in which act the pelt is often lost) and finally securing it on board ship; but so long as the seal remains unshipped it is exposed to various casualties, which may remove it beyond the power and possession of the killer as completely as if it were alive in the water, and may prevent him effectuating the object of his enterprise.

In Bell's principles of Scotch law, title “occupancy,” it is declared “that an act of appropriation to vest the property in animals *feræ naturæ* is effectual only *when it is complete*.” Now of what avail is it that a sealing crew should kill their thousands, if they are unable—through the perils of the sea and the drifting of the ice—to secure the possession of them in their vessel? then is all their labor in vain, and the object in view utterly defeated, the qualified property which alone they had whilst killing them is lost, and the event in the present case demonstrates that an absolute and *indefeasible* property had never vested, for the elements defeated it.

It may be useful to reflect for a moment upon the consequences that will result from this new doctrine. I will put a suppositious case likely enough to occur. A man kills a number of seals and leaves them on the ice; before he can take them on board, his vessel is sunk by some accident of the sea, his crew are able to save their lives, but are powerless to save their seals; the ice and the seals drift away and are eventually found by a more fortunate sealer, who takes possession of what he finds thus afloat and unguarded, and appropriates to his own use what otherwise would be lost to all the world. By the doctrine now maintained by my learned brothers, the man who

avowedly cannot get possession of these seals and save them for himself at the ice, may nevertheless recover them after they have been brought, by the industry of another, into port, and especially by an action of trover, which pre-supposes a right to possession, that is admitted to have been a physical impossibility.

Or, suppose another case: A kills a number of seals which he sculps, marks and leaves on the ice; before he can secure them on board, the ice is carried away by wind and tides wholly beyond his reach and control, he afterwards is fortunate enough to fill his vessel with other seals; those first killed are found by B, who takes possession of them and secures them in his vessel. By the doctrine now propounded the first lot became, by the mere act of killing and sculping, the absolute property of the killer, and although he had not means to secure them or bring them into port, he is nevertheless entitled to recover their value from the man who could and did save them.

These startling consequences are the necessary result of the novel interpretation of the law now introduced, and of abandoning the ancient usage and simple rule hitherto administered in our Courts, which declared that the right of property in seals at the ice was dependent upon the ability to get them into full possession, by putting them on shipboard or on the shore, as is sometimes done.

The case *Young v. Hickens*, 6 Q. B., 606, is to the same effect. The plaintiff had encompassed a shoal of pilchards by a net with the exception of a small opening, but had not actually secured them when the defendant interfered. Lord Denny held that the plaintiff had not sufficient possession to maintain trespass, because he "could not be said to have had possession of the fish till he had *actual power* over it."

The same rule prevails at the whale fishery. It has been established by various decisions from the year 1788 to 1827, that "the fish is the property of the first striker *only* so long as it continues under his *power and management*, and when the first striker loses his power and management over it, it becomes what is termed a loose fish and is the property of the person who afterwards secures it."—*Littledale v. Scarth*. 1 Toun.; *Hogarth v Jackson*, 2 C. & P.

I cannot find in any of the whale cases a decision, or even an *obiter dictum*, that the mere killing the fish without the ability to get it into actual possession and power vests absolute property in the killer.

It has been argued that the seal being dead cannot "escape," and that such word must relate to a living animal. That may be grammatically true, but is it really a fact? Of course it cannot *actively* paddle away, but may it not *passively* be floated away? And what practical difference does it make whether the seal is lost by its own action, or by the action of the ice on which it floats? The substantial fact being that whether actively or passively the animal is lost to the man who killed it.

The pernicious consequences to the trade likely to follow from this new intrepertation, and the prolific source of litigation it will prove, have been well depicted by Mr. Pinsent; but perhaps such inconveniences are subject rather for the consideration of the Legislature than of the judges, who must administer the law irrespective of consequences.

The grave question here is, what is the law? Is it what the Supreme Court has for the last forty years uniformly and unanimously declared, or is it what the Supreme Court of to-day by a majority of its judges declare, in opposition to the former ruling? And in the next case that shall arise, which ruling is to prevail?

Such uncertainty in relation to one of the staple trades of the colony cannot it seems be avoided, nevertheless it is to be regretted; for my part I feel it to be wise and safe "to stand upon the ancient ways," which in the present instance I believe to be also the legal ways, and in my opinion the rule should be made absolute on the grounds to which I have adverted.

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HON. MR. JUSTICE HAYWARD:

This case was tried before a special jury in the last term of the Supreme Court. The plaintiffs were owners of a vessel called the *Brothers*, and the defendant, Kane, was master and owner of a vessel called the *Barbara*.

The plaintiffs' vessel proceeded on a voyage to the seal fishery last spring, and during its prosecution, according to the proof, on Saturday the 17th day of April the crew killed a quantity of seals, estimated at about 3,000, about two miles from where the vessel lay. Some of these they sculped, others they cut open, which they hauled together in piles with some round seals, and some remained scattered. After this, on that day, they hoisted a muffler on a pole, as a signal or flag, upon the spot where the seals were, and took on board the vessel about 150. On this and the following days they got on board be-

tween 1,400 and 1,500. On Wednesday, the 21st, the defendant's vessel came near the remaining seals, and on the next day, as appeared by plaintiffs' proof, their flag disappeared and the crew of defendant's vessel commenced taking on board her the nearest seals to plaintiffs' vessel, so on that day they hauled only about 60 in place of 200, which they otherwise would have got on board, and that on that night the wind favored them, so that if defendants had not taken their seals they might have run into them and secured the whole; and also, that the defendants must have taken about 1,000 of their seals.

The defendant, Kane, very candidly and honestly admitted, upon his examination, that his crew had taken at the time in question about 700 dead seals, but denied that they were all killed by the plaintiffs' crew, and urged that such of them as were, had not been reduced into possession and had been abandoned by the plaintiffs, as they could not get them on board, and they being on the ice he (Kane) had a right to take them as his own.

The jury, after having been directed by the court as to the law in such cases, returned a verdict of £238 cy. for the plaintiffs, stating that the defendant had necessarily taken the seals (meaning that the plaintiffs' vessel could not have taken them), and that they had allowed him a liberal salvage according to the law laid down by the court.

Mr. Pinsent, for defendants, excepted to the charge, and moved for a rule *nisi* to set aside the verdict on the grounds of misdirection by the court (which was granted for argument), and contended—

1st—That the seals having been found to have been taken necessarily by defendant, the right of property in the plaintiffs had been lost—and that it was a misdirection in stating to the jury that if the seals were not voluntarily abandoned and the defendant took them necessarily that the verdict should be for the plaintiffs, subject to salvage.

2nd—That the jury should have been directed to find a verdict for Baine, Johnston & Co., co-defendants, as there was no proof of a joint conversion with the other defendants.

3rd—That the jury should not have been directed regarding a custom alleged to have been proven that the proof only extended to the right of a finder of a scattered round seal to take it; and

4th—That the present plaintiffs were entitled to reserve only half the seals, as the remainder belonged to the crew.

These several points were argued with much ability by the counsel for the parties on both sides in the last post terminal sittings.

After careful consideration of the evidence and of the law applicable to this case, I am of opinion, upon the first exception, that the jury was rightly directed by the court, for the following reasons: the seals having been (as found by the jury) killed by the plaintiffs' crew, were reduced into possession by them by their afterwards sculping, cutting open, piling, flagging and executing all the rights of ownership over them, and by their so doing no distinction existed as regards the right of property between this and any other that a man may lawfully acquire, and when once acquired it does not appear to me to be of any importance in law as to whether such property was on the ice or on the land, or whether it was liable to drift away and be lost by any other accident.

The law with regard to animals *feræ naturæ* (which seals are) is thus defined: "When a man has once *seized* them they become, whilst living, his *qualified* property, and, if dead, are *absolutely* his own." Or, in other words, if a person becomes possessed of wild animals by reclaiming and making them tame by art or industry, or by so confining them within his own immediate power that they cannot escape and use their natural liberty, he has a right to them against all the world whilst so in his possession; yet if they escape and return to their original state, his property in them ceases and they may be taken by anyone who finds them; but in cases where wild animals are *seized* and *killed* by any person, they become *absolutely* his property. I do not mean to assert that if a man shoots at a seal and wounds it, and it afterwards dies, that he thereby acquires any property in it; but that, after it is dead, if he have the control and mastery over it, he has as absolute a title as he would have to any other property that he may possess.

If, whilst a person is in the pursuit of or is killing seals, he should lose his watch or ring, it will be admitted that he thereby only loses possession, but not his right of property in them, and that in such case he may recover them by action, the finder being only entitled to remuneration for his trouble. Such articles are in law a man's *absolute* property, and so are seals designated when killed and seized. This being the case I cannot see that a rule of law should apply to one that does not apply to the other. It is also clear that in cases of jettison, where property is thrown overboard from a vessel at sea in order to her

safety, that the owner does not thereby lose his right to it if recovered; on the contrary, it is still his property, and the fortunate finder is entitled to a liberal salvage for securing it, and so the law stands with regard to other lost property.

I am aware that many persons of intelligence, who are experienced in the seal fishery, have expressed opinions that if seals killed and taken possession of drift away, or from other causes cannot be secured on board the ship, that the finder should be at liberty to take them to his own use without regard to the rights of the legal owner. Should it be considered necessary for the purposes of the seal fishery that a different rule than the present should exist, the legislature alone can deal with the subject; but we are not called upon to determine what ought to be, but what is the law as it now stands regarding the question. I think, however, that it would be difficult to frame laws to meet particular and exceptional cases without creating confusion and difficulty, and perhaps the present general law of property may in the end be considered the safest and best rule.

Independently of the law in such cases it does not appear to be reasonable or just where persons have become possessed of property by much toil and labour, but by misfortune are dispossessed of it, that others who have the good fortune to have it by accident thrown in their way, but who never worked for it, should reap all the benefit of the owner's labour; but it appears more equitable that those who worked for it and those who ultimately secured it should mutually share in the profits accruing from it; and in the present instance it would be a great hardship if the plaintiffs were altogether deprived of their property, which would be the case if the point insisted upon by the defendants were to prevail, whilst, on the other hand, substantial justice has been done to all parties by the jury having awarded the defendants a liberal salvage for their trouble and good luck.

In this case the jury were directed upon the principle of the plaintiffs having acquired an absolute property in the seals, and were told that they would not lose it by the accident of their not being able to get them on board their vessel, but that liberal salvage should be allowed if the jury decided that they were necessarily taken by defendants, and I am of opinion that that direction was legal and right, for whilst the position before stated as to the *absolute* right of property is clearly laid down in all our authorities, there are none, on the other hand, to support

that urged by the defendant, viz., that the plaintiffs being prevented by the action of the winds and sea and by misfortune in getting their seals on board their vessel, they lost all property in them, and that they, therefore, became the absolute property of the first fortunate finder.

I take the rule, therefore, to be with regard to seals as any other property—

1st—If they be killed and reduced into possession, although not put on board the vessel, no one has a right to interfere with them if the owner can get them on board.

2nd—If the seals cannot be got on board by the owners they may be taken by others, who will be entitled to a salvage according to circumstances.

3rd—If the right of property be entirely and absolutely abandoned by the owners they belong to the first finder, who may then appropriate them to his own use.

As to the other points urged by defendants, I am of opinion that the sale and delivery, by Kane, to Baine, Johnston & Co., was a conversion by the latter.

No legal custom was proven except as regards a few scattered round seals.

The plaintiffs had a property in the whole until the crew had finally performed their contract.

The rule *nisi*, therefore, should be discharged.

*Mr. Carter (Att'y General) and Mr. P. Emerson* for plaintiffs.

*Mr. Pinsent, Q. C.*, for defendants.

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1870, *July*. HON. SIR H. HOYLES, C. J.

*Insolvency—Preferential claims—Sharemen of dealers who themselves are dealers of insolvents—Skinners, carters and cullers—Sealers' share of sealing voyage—Servants hired without knowledge of insolvents.*

The term "servants," under the 22nd section of the Insolvency Act, includes skimmers, cullers, and all persons who render personal service on the trading establishment of insolvents, and under insolvency are entitled to be paid in full the balances due them for the current year. This would not, however, include amounts due carters, which are made up of hire and use of horses and carts, and cannot be considered as servant's wages.

THE master, Lewis W. Emerson, Esq., to whom by order dated Nov. 9th, 1870, it was referred to take an account of the preferable claims upon the said estate, having applied for advice and direction in regard to the claims hereinafter mentioned, I have brought these claims under the consideration of the Judges of the Supreme Court, and they having heard counsel for many of the parties interested, the reports of the master upon certain facts, and the verdict of a jury in the case of Patrick Kelly, and having considered the points submitted to them, are of opinion as follows:

*First*—As to the case of Pat'k Kelly, a shareman of Michael Mearney, a dealer of John Pomfrey, the said Pomfrey being himself a dealer of the insolvents, the said Kelly claiming against the insolvents as receivers of his voyage, with notice under the provisions of the 19th section of the Act 25th Vic., cap. 7, and his claim being resisted by the trustees on the alleged grounds: 1st, of the said John Pomfrey and not the insolvents being such receiver; and 2ndly, of the insolvents not having received the notice required by the Act; a jury empannelled to try these questions of fact having found both in favor of Kelly, a finding in which the judges entirely concur, the judges are of opinion that the objections raised to the payment of this claim by the trustees cannot be sustained.

*Secondly*,—In the cases of John Shea, a skinner, and James Alcock, a culler, claiming for wages due to them in these capacities as being *servants*, under the 22nd section of the Act, the judges are of opinion, that the term "*servants*" was intended by the legislature to include, amongst others, all persons who (not being contractors or mechanics engaged on an occasional or special service) render personal services in the ordinary course of business on the trading establishment of an insol-

vent, and that these parties coming under this definition (a definition which, though perhaps subject to occasional exception, appears to be sufficiently accurate for general application), are entitled to the balances due to them for the current year.

*Thirdly*—In the case of Thos Diamond, claiming the value of a share of seals earned by him during the last spring's sealing voyage, the judges are of opinion that under the very special terms of the case agreed upon by the parties, which expressly *admits* the claimant to have been a *servant* of the insolvents, and does not even indirectly shew a substitution of the relation of vendor and vendee for that of master and servant, this applicant is entitled to what he seeks; but, in thus deciding, the judges must not be understood as laying down any rule or principle for the determination of other cases except those, the circumstances of which correspond exactly with the details of Diamond's case.

*Fourthly*—In the cases of Matthew Stephenson and George Shephard, claiming balances due to them as carters, the judges are of opinion that these claims, being of a compound character and made up for the greater part of charges for the use of horses and carts, cannot be considered as "*servants' wages*," and ought not, therefore, to be paid preferably.

*Fifthly*—In the cases of the servants of John Pomfrey, William Riley, Jeremiah Pomfrey, William Morgan and John Joy, hired by their respective masters without the knowledge and consent of the insolvents, the judges are of opinion that in default of such further proceedings as are recommended by the master's report of the 11th November last, such report, so far as it disallows these claims, should be confirmed.

In accordance, therefore, with these opinions, I do order and direct that the trustees of the said estate do pay to the said claimants, other than those fourthly and fifthly above mentioned, the amounts respectively due to them so far as the funds in their hands available and subject to such claims shall extend.

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1870, July. HON. MR. JUSTICE HAYWARD.

*Principal and agent—Mutual Insurance Club—Payment by member of contribution to secretary—Insolvency of secretary—Liability of members for default of secretary.*

The plaintiff's vessels were insured in a Mutual Insurance Club, and being lost he was awarded the full amount due him. The defendant paid his full share to the secretary of the club, the latter before final payment to the plaintiff died and his estate was found to be insolvent. In an action against the defendant for a repayment of his contribution already paid the secretary,

*Held*—The defendant having paid his proportion to the secretary discharged his obligation and cannot be called on to answer for the secretary's default.

The secretary was the agent for the plaintiff and a payment to the former was a payment to the latter.

THIS case was tried in the last sitting of this Court.

In the year 1867 the plaintiff and defendant were insurers in the "Mutual Insurance Society of Brigus," each party having risks on several vessels covered in that society, the rules of which contain the agreement between the parties, and amongst other things, declare that each member shall underwrite on each particular vessel the valuation at which she is entered in the society, and bear reciprocally the proportions of the losses therein mentioned.

Whilst the plaintiff's vessels were so insured several losses occurred, and he claimed on the society for the sum of about £1,500, his right to which was not disputed, but it was duly passed by the society and order made for its payment, and the defendant did pay his full share of this amount to James N. Leamon, who was then the secretary of this society.

The plaintiff received from the secretary the amount of this insurance less a balance of about £200, for his proportion of which last sum of money the present action is brought under the following circumstances, viz.:—that before final payment of the amount to the plaintiff Leamon died, and being at that time in insolvent circumstances his estate was afterwards declared insolvent, and the plaintiff never was paid the full amount to which he was entitled.

Mr. Kent contended for the plaintiff, that Leamon was the secretary and agent for the society but not for him personally; that until he, the plaintiff, received the full amount of his insurance the society and each individual member were responsible to him, and that a payment to the secretary could not be considered a payment to him, the plaintiff.

On the other hand, it was contended by Mr. Carter for the defendant, that Leamon was the mutual agent of all parties, and that the payment to him was a payment to the plaintiff and a full discharge of his liability.

This point, which was the only one in controversy, was reserved for the consideration and judgment of the Court.

The 8th rule of this society prescribes the duty and authority of the secretary, as follows:—"The secretary is also to collect from each member moneys due at the time hereinafter mentioned, namely, upon losses occurring on or before the 31st day of May, he is, with all possible despatch after the case is decided by the committee, to collect 80 per cent of the amount awarded and pay the same over immediately to the lawful claimant, and upon losses occurring subsequent to the above date he is, on the 31st day of October to collect, &c., &c.,"—"reserving in his hands 10 per cent of the sum insured until all claims for the current year are decided";—and by the same rule, "He shall, on or before the first day of May, furnish to each member, from his book of records, a list of the names and value of all vessels insured, and act as the lawful attorney of the society."

These rules were signed, as therein prescribed, by the parties, and formed the mutual agreement by which they were bound to contribute towards each other's loss, and the medium through which the amount of such loss should be collected and afterwards paid to the lawful claimant.

In addition to the authority given to the secretary by these rules, a power of attorney was produced, signed by the parties to this action, by which they constituted him their attorney, for them and in their names and stead to transact and execute all manner of business appertaining to his duty as secretary of the said society.

After having fully considered this case we are of opinion, that the defendant having paid his proportion of the losses to the secretary, as pointed out in the contract between the parties, has discharged his obligation and cannot now be called upon to answer for his (the secretary's) default, who was authorized to receive it and was in this particular the agent of the plaintiff and held the amount for him, and a payment to him was a payment to the plaintiff himself.

We therefore direct a verdict to be entered for the defendant.

*Mr. Kent* for plaintiff.

*Mr. Carter, Q. C., and Mr. Hayward* for defendants.

1870, July. HON. SIR H. HOYLES, C. J.

*Principal and agent—Government—Poor Commissioner—Authority necessary to bind Government.*

Where it had appeared that a Poor Commissioner had no express authority to effect purchases on account of the Government, but had a general authority in cases of pressing destitution to contract for supplies.

*Held*—The *bona fide* exercise of such authority would be binding on the Government.

In this suit the petitioner, proceeding under the provisions of the Act 27 Vic., c. 8, claims a sum of four hundred and eighty-six dollars, a balance alleged to be due him by the Government on the sale of a quantity of peas, delivered by petitioner in November, 1867, to the destitute poor of Placentia on the order of Francis L. Bradshaw, Commissioner of the Poor for that district.

The claim is resisted on two grounds; first, that Mr. Bradshaw had no authority from the Government to purchase the peas; and secondly, that a sum of three hundred dollars, paid by the Government to the petitioner, not thereby admitting any legal claim on his part, but solely upon equitable considerations, was paid and accepted in full discharge of his whole claim.

We have considered the evidence taken in this case, and we are of opinion that under it the petitioner is entitled to recover.

Although the commissioner was not expressly authorized to purchase the peas, he had, as appears by the evidence of Thos. O'Rielly, a general authority as commissioner to contract for supplies on behalf of the Government in cases of extreme and pressing destitution, such as the present case is stated by the witnesses to have been, and the *bona fide* exercise of that authority would be binding on the Government.

The payment of the three hundred dollars, though intended by the Government to be in full, was not in fact so made to and accepted by the petitioner, who asserts his uniform refusal to compromise his claim, and the payment of part under such circumstances would be no answer to a suit for the remainder.

There must be a judgment for the petitioner with costs.

*Mr. Kent* for petitioner.

*Hon. Attorney General* for the Government.

1870, *July*. HON. MR. JUSTICE HAYWARD.

*Insurance—Marine Mutual Insurance Society—Construction of rules—Total loss—Partial loss “if vessel be stranded”*

A vessel insured under the rules of the Mutual Insurance Society of Brigus, on a voyage from Harbor Grace to Sydney, C. B., owing to stress of wind, lost her sails, spars and rigging. She was afterwards repaired by the owner. In an action against a member of the Club for his contribution,

*Held*—There being no total loss or partial loss by stranding, there was no liability under the rules of the Club.

THIS case came on for trial at the last sitting of this Court.

It appeared that in the year 1868 the plaintiff, being the owner of a vessel called the *William Whelan*, insured her in the Mutual Insurance Society of Brigus. The defendant was a member of that Society, and as such, by its rules, liable for his share of any losses sustained on the risks insured against.

Whilst the plaintiff's vessel was so insured she proceeded from Harbor Grace on a voyage to Sydney, C. B., and during its prosecution she was struck by a heavy squall of wind which carried away her masts, sails and rigging, leaving scarcely anything but the hull; she was then towed to St. John's, and afterwards back to Harbor Grace, where she was repaired at a cost of about £800.

For his contribution towards the payment of this amount the present defendant is sued, and all points necessary to sustain the plaintiff's claim were admitted upon the trial, with the exception of the liability of the members of the Society, under their rules, to pay for such a loss as the present

We have carefully examined these rules, which form the agreement between the parties, with a view of ascertaining if any of them convey words which create liability on the defendant for contribution towards the loss shown to have been sustained by the plaintiff in this case.

We find in the third rule the losses agreed to be insured against by the society, and which is worded as follows: “Each member shall underwrite on each particular vessel the valuation at which she is entered in the society, and bear reciprocally the proportions of any *total loss* that may happen either at sea or in port arising from the winds, seas, &c., and also of such partial loss *if the vessel be stranded* at the time of such partial loss, *but not otherwise*—as shall with the necessary incidental charges amount to,” &c.

The plaintiff may consider it hard upon him to have to bear such heavy loss as it is admitted he has sustained by this accident, but we do not find that there is any legal liability on the part of the society to indemnify him.

This was not a *total loss*, nor was the vessel *stranded*; and as the society only insured against a *total loss*, or partial loss *if the vessel be stranded*, we order a verdict to be entered for the defendant.

*Mr. P. Emerson and Mr. Pinsent, Q.C., for plaintiff.*

*Mr. Carter for defendant.*

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AVERY ET AL v. INMAN S. S. CO.

1870, *July*. HON SIR H. HOYLES, C. J.

*Shipping—Bill of Lading—Shipowners liability for damages to cargo—  
Improper stowage.*

A carrier is only bound to use all reasonable and proper means, but not every possible means, to secure the safe stowage of his cargo. It is not incumbent on him to take special and exceptional precaution for its safe carriage.

THIS action was brought to recover the value of a cask of oil, shipped by the plaintiffs in January, 1870, on board the defendant's vessel the *City of Halifax*, for carriage from St. John's to Halifax, and which was broken and destroyed by the shifting of the cargo during the voyage, in consequence, as alleged by the plaintiffs, of improper stowage.

The defence was, first, that under the special clauses of the bill of lading, the defendants were exempt from liability for loss arising from breakage or negligence of the crew; and 2ndly, that the oil was properly stowed, and the loss attributable solely to the perils of the sea.

The point of the case, on the second ground of defence, was as to the manner of stowage.

Evidence was given by the plaintiff to shew, that when as in this case, a space is left between the casks of which the cargo is composed and the deck, it is necessary, especially on a winter voyage, to secure the casks from shifting, either by

beams laid across them and wedged against the sides of the ship, or by stancheons put between the casks and the deck, precautions omitted on the present occasion, and to the want of which the loss, as contended by the plaintiffs, was altogether owing.

For the defence, on the other hand, a number of witnesses deposed, that the use of beams and stancheons in the manner described, in addition to the ordinary means of safe stowage, is unusual, productive of no good effect, and even dangerous, and it was also sworn, that from the extraordinary violence of the wind and waves at the time of the damage, beams and stancheons if used would not have prevented the shifting of the cargo, and that the casks were stowed in the accustomed manner of oil cargoes with all proper care.

After a close examination of this conflicting testimony, we are of opinion that its fair effect is to show, that to employ beams and stancheons would be, if advisable, at all events a special and exceptional precaution, such as it would not be incumbent upon a carrier who is bound to *use all reasonable and proper*, but not *every possible* means of securing his cargo, to adopt, that this oil was properly stowed according to the usual and most accustomed manner of the trade, and that the loss *was* attributable to the perils of the sea, and not to the negligence of the defendants.

Under these circumstances it is not necessary that we should examine minutely the terms of the bill of lading, but we may observe, that we are by no means of opinion that its condition would exempt the defendants from liability, had the loss been occasioned by insufficient stowage — 3 H. & C., 284, *the Helene*, P.C.C., 1866.

*Mr. Pinsent, Q. C., and Mr. Winter* for plaintiff.

*Mr. Carter, Q. C.,* for defendants.

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1870, *July*. HON. SIR H. HOYLES, C. J.

*Insurance marine—Seaworthiness—Beginning of adventure—Total loss—  
Practice—Rule nisi—New trial.*

Where a vessel laying in the harbor taking in her cargo, without apparent cause became leaky, founders without encountering any extraordinary peril or other visible cause to produce such effect, this is strong presumptive evidence that she was not seaworthy when the cargo was placed in her.

It is a warranty precedent implied in every voyage policy that the ship in which the goods are insured, should at the lading of the goods on board be seaworthy for the voyage. It lies upon the plaintiff in every case to show that this condition has been fulfilled.

THIS action was brought to recover the sum of \$800, being an amount claimed by the plaintiff as due to him on a policy of the defendants, made on the 23rd September, 1869, whereby they insured for the plaintiff "*fish valued at £200 cy., as interest might appear in codfish at 16s. per quintal,*" on a voyage in the schooner *Balina* at and from Grady Harbor, Labrador, to St. John's, with liberty to call at Little Harbor, "*beginning the adventure upon the said goods from the loading thereof, and so continuing, &c.*"

The declaration, besides containing the usual averments, alleged a total loss under the policy by the perils insured against, and the defendants, besides other grounds of defence which it is not necessary to notice, pleaded that the said ship at the commencement of the risk in the said policy mentioned, was not seaworthy for the said voyage, upon which plea the plaintiff took issue.

At the trial, which took place in the last December term, the facts of the case appeared to be that in the month of June preceding, the plaintiff, being the supplier of one Cornelius Shea and his crew of five men on a fishing voyage to the Labrador, had hired the *Balina* for their use from Mr. Philip Hutchins, and that in her Shea and his crew prosecuted their voyage during the summer, calling and fishing at several places on the coast until they arrived at Grady, where after fishing for some days, they proceeded to cure their fish and prepare for their return to St. John's. By the afternoon of the 24th of September all their fish, with a trifling exception, had been cured and put on board the *Balina*, there being in all in the cargo about 270 qtls. and a quantity of oil. The vessel then lay at anchor in the harbor of Grady, off the premises where Shea and his crew conducted their fishery. About four p. m.

of that day, the crew having finished their day's work went ashore to tea, leaving the vessel in apparent safety, but about ten p.m. on returning on board they found that in their absence she had sprung a leak and made a large quantity of water, and that the leak appeared to be rapidly increasing. The master, who slept on shore, was immediately called, and all hands did their best to free the vessel by pumping, but their efforts were unavailing, the water continued to gain upon them, and about one o'clock a.m. they were compelled to abandon her, and in half an hour after she sank at her moorings.

The night appears to have been fine, there was a fresh breeze off shore and "*a little side roll*," as the witness expressed it, but there was nothing in the state of the weather or the sea to account for the leak, the cause of which the crew were unable to explain, but one of them suggested that it might be the starting of a butt-end. With regard to the condition of the vessel previously they stated that during the summer, from the time of their departure from St. John's, the *Balina* had been tight, requiring only two spells of pumping per day of six or seven minutes each; that she had not experienced any heavy weather, had met with no accident, except that on one occasion she had grazed upon a mud bank, but without sustaining any damage; that at the Labrador, after grazing on the mud bank, they had examined and cleaned her bottom and had found nothing the matter with her, and that at the time of the loss she was in their opinion seaworthy, staunch and strong. In addition to the testimony of the crew, a ship's carpenter deposed that before the *Balina* left for the Labrador, he had hove her down and examined her bottom, but found no hole in it; had trimmed her from stem to stern and made her as tight as could be, and that she left his hands in a seaworthy condition; and Mr. Hutchins, the owner, stated that he had superintended the repairs made by the preceding witness, who did his work well; that he was satisfied she was in a seaworthy condition when she left the harbor, and that she would not sink down in harbor unless from accident, or unless there was something wrong that he did not know of.

At the close of the plaintiff's case, the defendant's counsel moved for a non-suit on several grounds, the principal of which was unseaworthiness. The court declined to non-suit, but reserved the points raised, with leave to the defendants to move thereafter should it be necessary, and a rule *nisi* subsequently obtained to set aside a verdict given for the plaintiff and enter

a non-suit upon points reserved was agreed during the present term by Mr. Kent for the plaintiff and Messrs. Pinsent and Carter for the defendants, and now stands for judgment.

It is a well known warranty or condition precedent implied in every voyage policy that the ships in which the goods are insured should at the lading of the goods on board, the inception of the risk, be seaworthy for the voyage—that is, fit and competent as to repairs, equipments, crew, and in all other respects, to encounter and resist the ordinary perils of the risk insured.—*2 Arnould, 597-648*. It lies upon the plaintiff to shew that this condition has been fulfilled wherever, as in this case, its performance has been challenged (*2 Arnould, 1090*), and if he fails in this respect and his default appears upon his own case, he falls short of establishing that which is necessary to entitle him to a verdict, and should be non-suited.

Here then the question is, has the plaintiff shewn that the *Balina*, as she lay in the harbor of Grady at the time of taking in her cargo, was seaworthy for that part of the voyage—that is, that she was competent under ordinary circumstances of wind and weather to float in the harbor with her cargo on board? If she was not she plainly could not be seaworthy, and the plaintiff's warranty had not been fulfilled. The facts are that as soon as she felt the weight of her cargo, no extraordinary state of the weather occasioning the catastrophe, she sprung a leak and went down in spite of the efforts made to save her.

These facts are consistent only with two hypothesis—either the vessel was incompetent, from some previously unknown defect in her hull, to sustain the weight of the cargo, or violence had been done to her by some of the crew, or by some one from the shore. But there is not the slightest evidence of any external injury being done to the vessel, and it cannot be supposed, in the absence of proof to that effect, that the crew would wilfully destroy their own property by sinking the ship which contained it, and unless the evidence of seaworthiness offered by the plaintiff rebuts the violent presumption arising from her loss, we are driven to the conclusion that she was not then seaworthy, in accordance with the recognized principles of marine insurance, that *when in a short period after sailing a vessel becomes leaky and founders, without encountering any extraordinary peril or other visible cause to produce such effect, this is strong presumptive evidence that she was not seaworthy when she sailed.*—*2nd Arnould, 648*.

After a careful consideration of this evidence, however, we are clearly of opinion that it is not at all inconsistent with and therefore does not rebut this presumption, and after much reflection we must confess our inability to discover the reasons which led the jury to a contrary conclusion. The carpenter who repaired the vessel in St. John's may have discovered no defects, and they may have existed notwithstanding, particularly as he did not, as far as appears, examine her interior, and could not therefore be acquainted with the state of her timbers or of her internal fastenings. The vessel might, as deposed by the crew, have been tight all the summer, when light or in ballast, and might have sustained no perceptible injury on the mud bank, and yet it is obvious that when subjected to the weight of her cargo and put deeper in the water than she had been since the spring, a fastening might give way, or the water-line might rise above an aperture previously unnoticed only because nothing had occurred to attract attention to it, while the opinions of these witnesses as to her seaworthiness were evidently based upon imperfect knowledge, and are consequently not to be relied upon. There being then nothing in this evidence to destroy the influence which inevitably arises from the fact of the *Balina* going down at her anchors in a quiet harbor, without any external cause being in operation to occasion this event, and it thus appearing upon the plaintiff's own case that one of the principal conditions upon which the defendants' liability rested had not been complied with, we are bound to make this rule absolute. The case is certainly a hard one for the plaintiff, but the law is plainly with the defendants and they are entitled to the benefit of it.

The conviction on the mind of Mr. Rogerson that at the time of effecting the insurance the vessel was seaworthy, and his having acted in entire good faith throughout the whole transaction, cannot avail to alter the law.

*Mr Kent* for the plaintiff.

*Mr. Carter, Q.C., and Mr. Pinsent* for defendants.

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1870, July. HON. SIR H. HOYLES, C. J.; ROBINSON, J.

*Will—Devise of real estate—Words of limitation and of purchase—Estate tail—Operation of Real Chattle Act.*

A testator devised certain lands to his nephews M., R., and J. (1) To M. certain lands specifically described, "and at his death this bequest reverts to his male children if any, but in default of male children" devise over to sons of another nephew, E. (2) To R. certain specified lands, "and at his death the said property entails to all his male children then living by equal shares." (3) To J. (a nephew supposed to be dead) certain specified lands, "and at the time of his death to his lawful heirs male if any, and in default of male issue the said property becomes the joint property of my aforesaid nephews M. and R., and after the death of either of them, the deceased's moiety entails to all his male children." It was further expressed as his will and desire "that all my landed and household property or estate now bequeathed shall remain hereditary in my male relations for the time being as aforesaid." "It therefore follows," adds the testator, "that no part of my property shall be enjoyed by any of my female relations hereafter." "My property is therefore to remain hereditary in my male relations named C. from henceforth for ever." The nephew M. had no sons and two daughters,

*Held*—That the words of the will expressed an intention of creating an estate tail in the devised properties; and so vested the absolute estate in the original devisees, said estate being under the Real Chattle Act (3 & 4 Wm. IV. cap. 1), [Con. Stat. 2nd Ser. Tit. VIII, chap. 777], a chattel interest.

*Held*—That the words in the devise to M. were words of limitation and not of purchase; and, had this devise stood alone, the devise over would have been good. But the intention of the testator must be gathered from consideration of the whole will, which clearly attempts to create an estate tail.

THE questions presented for our determination in this cause arise upon the construction of the will of John Cuddihy, late of St. John's, fish culler, who died at that place in the year 1841.

The material parts of the will are these:

2nd—"I devise and bequeath to my nephew Matthew Cuddihy [certain lands particularly described], and at his (*Matthew Cuddihy's*) death this bequest reverts to his male children, if any, but in default of male children the property now bequeathed to my said nephew from thenceforth becomes the property of my brother Edward's two sons now living in Ireland," &c.

3rd—"I give and bequeath to my nephew Richard Cuddihy [certain lands particularly described], and at his (*Richard Cuddihy's*) death the said property entails to all his male children then living, by equal shares to each of them."

4th—"As no account for the last three years has been received of my nephew John Cuddihy, mariner, it is generally

conjectured he is dead, but if he is still living it is my desire and request that he is to have and hold all my [certain lands particularly described], and at the time of his death to his lawful heirs, male if any, and in default of male issue, the said property then becomes the joint property of my aforesaid nephews, Matthew and Richard Cuddihy, and after the death of either of them the deceased's moiety entails to all his male children."

"It being furthermore my express will and desire that all my landed and household property or estate now bequeathed, shall remain hereditary in my male relations for the time being as aforesaid, it therefore follows that no part of my property shall be enjoyed by any of my female relatives hereafter."

\* \* \* \* \*

"My property is therefore to remain hereditary in my male relations, named Cuddihy, from henceforth for ever."

Matthew Cuddihy had no son, but left him surviving two daughters. John Cuddihy was never heard of after the making of the will, and after the death of the testator, Matthew and Richard took possession of his bequest, and held it with their own shares to the times of their respective deaths. Richard left sons and daughters, of whom the defendant, Michael Cuddihy, is the surviving son.

Michael Cuddihy claims Matthew's land and also Matthew's half of John's land, to the entire exclusion of Matthew's daughters, on the ground that the testator's intention was that all his land should go to his male descendants, of whom he is the sole survivor.

The complainant on behalf of Matthew's daughters, claims all that their father possessed, on the ground that under the words of the will Matthew took an estate tail in these lands, and that such a bequest would, on the operation of Real Chateles Act, give him the absolute property in them, and at his death they would rest in his executor or administrator for distribution as other personal property would do.

The question raised by the special case is, whether the daughters of Matthew take any, and if any, what share in the lands which their father in his life time thus held in possession?

I am of opinion that if the devise to Matthew in section two of the will stood alone, Matthew would take a life estate only in the property there mentioned, the limitations over would be good, and the daughters would be excluded, the words male children in this section being words of purchase (*See Buffan*

and *Bradford 2. Atkins 220*); but that looking to section three where the testator, with the same intention towards Richard as he had towards Matthew in section two, uses the words "at his (Richard) death the said property entails to all his male children then living, by equal shares to each of them." Section four, where in furtherance of the same intention apparently towards John, he uses the words "*to his lawful heirs*," and "*in default of male issue*," as (plain words of limitation) synonymous with the words "*male childaen*" in section two—adding in the limitation in remainder after John's bequest, the words "*after the death of either of them, the deceased's moiety entails to all his male children*," and taking into account also the subsequent part of the will where he unequivocally declares his intention to be that all his landed property before bequeathed should remain hereditary in his male relations for the time being as aforesaid, the object of the testator plainly was to give Matthew an estate tail in the properties mentioned in sections two and four; that under the combined operation of our local Act declaring all landed property in Newfoundland to be real chattels, and of the well known rule of law by which words which would create an estate tail in realty, give the absolute property in chattels (*2 Jarmin on Wills, 534, 3d Ed.*), Matthew became the absolute owner of these lands; and that consequently they would at his decease, if previously undisposed of by him, pass to his personal representatives for distribution amongst his next of kin.

Under these circumstances, my brother judges concurring in the conclusion at which I have arrived, the daughters of Matthew will take what their father possessed, the general prohibition in the will against females taking and that against alienation being alike plainly inoperative.

In this judgment the rights of John, should the legacy to him not have lapsed as is supposed, and (if any such) of the nephews in Ireland who could not be found to be made parties to this suit, are of course reserved.

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HON. MR. JUSTICE ROBINSON:

The judgment of the court is required upon three specific questions arising out of facts admitted, and set forth in a special case.

To those questions and facts our reply must necessarily be confined, and I strictly limit my judgment to them.

In answer to the first question, I think that the will of John Cuddihy is not effectual to debar the female children of Matthew Cuddihy from the enjoyment of all or of any of the lands in this colony held by Matthew at the period of his death by virtue of John's will, for the reason that lands in Newfoundland are chattels and are not the subject of entail.

Looking at the whole of John's will it is plain that he intended to create an estate tail in the lands he bequeathed, and as the law will not suffer such an estate in property of that description, the rule is that the first possessor of a chattel bequest takes the whole property divested of those conditions and limitations that, read in the case of realty, have created an estate tail.

Here Matthew takes the whole property in the lands bequeathed to him and of which he died possessed, and dying intestate the estate goes to his administrator, and is devisable amongst all next of kin, who seem to be his two daughters. The answers to the second and third questions are embraced in the answer to the first.

Mr. Justice Hayward concurred with the conclusions arrived at by his brother judges.

*A. J. W. McNeily and R. J. Pinsent, Q.C.*, for complainants.

*Attorney General* for defendants.

1871, *July*. HON. SIR H. HOYLES, C. J.

*Practice—Pleadings—Demurrer—Insurance—Marine—Time policy—Total loss—Unseaworthiness.*

In an action to recover as upon a total loss the amount underwritten in a time policy, the defendants pleaded "that the loss was occasioned by the unseaworthiness of the vessel and not by the perils insured against "

*Held*,—On demurrer, the plea was too general and could not be sustained. The necessary facts to sustain such a plea must be specially pleaded.

ACTION to recover as upon a total loss, the amount underwritten by the defendants, in a time policy on the schooner *Maggie McNeil*. Plea—*that the loss was occasioned by the unseaworthiness of the vessel and not by the perils insured against, to which plea as containing, no defence to the action the plaintiff demurred.*

Having regard to the various decisions upon the subject of unseaworthiness, all of which are to be found in Arnould on Insurance, we are of opinion that, generally speaking, it cannot now be contended, that there is any warranty of seaworthiness in relation to time policies. The defendants, however maintain, that even admitting this principle, the present plea can be sustained on the authority of a statement in Bullen & Leake, that it is a good defence in an action on a time policy, that the loss arose from the unseaworthiness of the ship and not from the perils insured against.

These writers give no form of such a plea, and as the case of Fancus & Saarsfield to which they refer as their authority for this broad statement, hardly sustains it, it may fairly be assumed that they refer rather to the general meaning and effect of such a defence, than to the manner of placing it upon the record.

Fancus & Saarsfield seems with reference to this point only to decide, that to a claim for a partial loss under a time policy, such loss being the cost of repairs made in a port into which the vessel, the subject of the insurance had put during its continuance, it is a good answer to say, that the vessel was unseaworthy at the commencement of the voyage, that she so continued up to the time of the loss, that no peril of the seas happened to her, and that the necessity for the repairs was occasioned by the bad and defective state of the ship.

Such a plea however, is, both in form and substance, very different from the one now under consideration, which, of the

several conditions there held to constitute collectively a defence, asserts but one, the loss by reason of the unseaworthiness.

To a claim under a voyage policy which is always subject to a warranty of seaworthiness, this plea would plainly be bad, as permitting the defendants to show as a sufficient matter of defence, a loss by unseaworthiness arising *during the progress* of a voyage, at the beginning of which, when only such warranty generally applies, the warranty had been fully complied with, and that perhaps in a case where such unseaworthiness was occasioned by a peril insured against; and if the plea would be no answer where there *was* a warranty of seaworthiness, a fortiori would it be insufficient where there was no such warranty.

The plea is in fact too general. It might be perfectly true, and the facts given in evidence might sustain it, and yet these facts might establish no defence; and the fault is not cured by the addition of the words "and not by the perils insured against," as these are added not as averring a substantial defence in themselves, but as an inference from the former part of the plea, and that failing, the inference also fails.

We must therefore hold that if it be intended to bring the present case within the principle of *Fancus & Saarsfield*, the necessary facts must be specially pleaded.

Judgment for the plaintiff.

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#### TAYLOR ET AL v. UNION MARINE INS. CO.

1871, *July*. HOYLES, C. J.; HAYWARD, J.

*Insurance—Marine—Risk—Constructive loading.*

Action on a policy of insurance, of and upon any kind of goods and merchandize in and upon the schooner 'Mary Ann', beginning the adventure from the loading of the goods on board the said schooner at St. John's, and so to continue, &c., &c., with permission to call at Carbonear and take in crew and goods. The schooner was lost on the voyage, having taken in goods at St. John's and Carbonear.

The declaration claimed for a total loss of the goods shipped at both places.

*Held*—The words "beginning the adventure on the loading of the said goods at St. John's" did not limit the risk to the goods so laden, but covered those laden at the other port.

THIS was an action on a policy of insurance at and from St. John's, of and upon any kind of goods and merchandize in and

upon the schooner *Mary Ann*, beginning the adventure upon the said goods from the loading thereof on board the said ship at St. John's, and so to continue until the said ship with all her goods and merchandize whatsoever shall have arrived at Bonne Bay, 48 hours, with permission to call at Carbonear and take in crew and goods—value £400 cy. as per margin, as interest shall appear," On the margin it was declared as follows, "Schooner *Mary Ann*, Taylor, outfits for herring fishery hence to Bonne Bay, calling at Carbonear." In October last the *Mary Ann* sailed on the voyage described, having taken goods at St. John's and Carbonear, and was lost on the voyage.

The declaration claims for a total loss of the goods shipped at both places. The defendant demurred to so much of the declaration as claimed for the goods shipped at Carbonear, and the question raised upon the argument was as to the liability of the underwriters for these goods.

The question is mainly one of construction—what was the intention of the parties to the policy as declared by the instrument in which they have embodied their intention, construed by reference to surrounding circumstances, and by regard to the legal rules governing the construction of these instruments?

Upon first reading this policy I was disposed to think that the clause "beginning the adventure on the loading of the said goods at St. John's," &c., limited the risk to the goods so laden, regarding the permission to call at Carbonear and take on board crew and goods as a license to deviate merely; but a careful consideration of the authorities leads me to the conclusion that the true construction of the policy includes and covers these latter goods.

Also, *Arnould*, after stating that it had been frequently decided that the clause "from the loading thereof on board the ship at," &c., covered only goods laden at the very terminus a quo, and that the strictness with which this rule had sometimes been applied had lately been the subject of severe animadversions, goes on to say that the strict rule of construction does not prevail where it can fairly be deduced from the whole construction of the policy that the parties contemplated loading, unloading, bartering or trading with goods at an intermediate port on the voyage insured, and that there the policy attached not only on the goods laden at the port of adventure, but also on those laden at any ports where the ship is empowered to touch and trade under the terms of the policy, or where upon a true construction of the whole instrument it must be

presumed such a loading was contemplated (*p. 371*). For this position he cites several authorities, all perhaps distinguishable from the present case with the exception of *Barclay and Stirling, 5 M. & S.*, which in principle is in my opinion on all fours with the present case, and which fully bears out Arnould's dictum, and ought to govern our decision here.

In *Barclay and Stirling* the insurance was on freight at and from ports of loading in Jamaica to the United Kingdom, with leave to call at any of the West India Islands for convoy, beginning the adventure upon the goods from the loading thereof on board the ship *as aforesaid*, "with liberty to touch and stay at all ports and places whatsoever and wheresoever, with leave to discharge, exchange and take on board goods at any port or place she might proceed to or touch at without being deemed any deviation from and without prejudice to this insurance."

On her voyage the vessel went ashore on the island of Cuba, and there lost part of her cargo; but being got off and repaired put into Havana, and there took on board other goods, with which she safely arrived in England.

In an action by the underwriters to recover back part of the freight which had been received by the assured, the question was raised whether the freight of the goods laden at Havana was included in the risk, and it was held by the full court that it was.

In giving judgment Lord Ellenborough says, "The ship being driven on the coast of Cuba by the accidents of the voyage, and without considering it as part of the voyage, this because a part of the voyage in the first instance, *the liberty given to touch and take in goods at Cuba incorporates this part of the adventure by necessary construction with the voyage.* It is said this liberty does no more than excuse a deviation, but the case of *Violet & Allmat* shews that an intermediate port may be included in the policy equally with the terminus a quo, and it is material that it should be quo."

This case seems clearly to establish that where in a policy of insurance describing the adventure as from the loading of the goods at a particular port, there is also a permission to call and load goods at another port. This permission not merely allows a deviation, as might be at first supposed, but actually incorporates the after laden goods in the risk—in other words, it discharges the previous implied restriction implied by the words, "beginning the adventure upon the loading of the said goods at," &c.

The principle of decision here adopted is recognized by Chief Justice Eile in the recent case of *Carr v. Montefiore*, 5 B. & S. 425, where after deciding with respect to a policy on goods beginning the risk from the loading of the goods from a port in the River Plate, that it was sufficient that the goods which had in fact been laden in another country were constructively laden in the River Plate, some of them having been taken out and put on board again to allow of some repairs to the vessel there, the Chief Justice observes in discussing the question whether the words "beginning the adventure upon the goods from the loading thereof on board the ship at the River Plate," were mere description or a condition or warranty that the goods should be laden at the port named. "I take Mr. Philips' work on insurance to be a masterly work, and he thus sums up the result of the authorities on this point, 'This specification of the terminus a quo, unless it appears by the policy to be a warranty of the loading at the designated place is to be taken as a mere recital description, intention or expectation, being at most an implied representation of the loading, and is to be construed accordingly.'"

The case of *Brown and Taylem*, 4 Ad. & Ellis, cited by Mr. Pinsent to show the strictness with which the risk is sometimes tied to the terminus a quo, does not in my opinion affect the point now under consideration. In that case the ship was insured at and from her port of loading in North America to Liverpool. She took in part of her cargo at one port, then left for another some miles away and took in the remainder and returned to the first port, whence she sailed for Liverpool and was lost on the voyage. It was held that the going to the second port to load and returning to the first was a deviation, the risk having commenced at the loading at the first port, and the words *port* of loading not being to read *ports*, so as to include both places.

In this case it is to be observed that there was nothing in the subsequent part of the policy inconsistent with the statement of the terminus a quo, no permission to load goods anywhere after departure, and although there was permission to touch and stay at any place, this permission could extend only to calling at places in the ordinary track of the voyage (*Arnould*, 445), and could not justify the going to the second port and returning to the first.

Judge Hayward agreeing with me upon the question at issue, the judgment on the demurrer must be for the plaintiff.

HON. MR. JUSTICE HAYWARD:

This is an action on a policy of insurance on goods and merchandize at and from St. John's in the schooner *Mary Ann*, beginning the adventure from the loading thereof at St. John's, and so to continue until the said ship with all her goods and merchandize whatsoever should have arrived at Bonne Bay, 48 hours, with permission to call at Carbonear and take in crew and goods

The vessel and cargo were lost, and the plaintiffs claim for the goods shipped at St. John's and at Carbonear also, and the defendants deny their liability for those shipped on board at Carbonear.

I have given due weight to the arguments of counsel on both sides, and have consulted the authorities bearing upon the subject, and have arrived at the same conclusion as the learned Chief Justice, that the goods shipped at Carbonear were after their loading covered by the policy, as well as those shipped at St. John's upon the commencement of the risk.

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### WALSH v. BARTLETT.

1871, July. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Insurance—Marine—Mutual Insurance Club—Construction of rules—Constructive total loss—Notice of abandonment—Practice—New trial.*

A ship insured for £1250, under the rules of "The Mutual Insurance Club of Brigus," was driven on shore in a violent gale of wind and became a constructive total loss. In an action for the insurance the jury found a verdict for the full amount. It was admitted that no notice of abandonment was given. On a rule *nisi* for a new trial,

*Held*—(Robinson, J., differing), discharging the rule. The sixth rule of the Insurance Club dispenses with the necessity for a notice of abandonment. The object of a notice of abandonment is to enable the insurers to take possession of the property as their own and dispose of it for their own benefit; under the sixth rule of the Club the necessity for this notice is waived by authorizing and making it incumbent upon the master to sell the wreck on the spot for the benefit of the society.

THIS case came before the Supreme Court upon a rule *nisi* to set aside, as contrary to evidence, a verdict had for the plaintiff in the spring term of the Northern Circuit Court, in an action

to recover for a total loss of the schooner *Bredalbane*, insured in the Brigus Insurance Society, of which the defendant was a member.

At the trial the defence was, that the loss was a partial and not a total loss, and that even if constructively total, as the jury found it to be, the plaintiff was only entitled to recover for a partial loss, for want of a sufficient notice of abandonment.

Upon the argument of the rule *nisi*, it was contended for the plaintiff, that the loss was an absolute total loss, requiring no notice of abandonment; that if only a constructive total loss, a sufficient notice had been given; and that in any case, the provisions of the sixth rule of the society rendered such notice unnecessary.

The defendant on the other hand, strove to maintain the position he had taken at the trial.

After referring to the notes of the learned judge before whom the cause was tried, I am clearly of opinion that the facts in evidence present no case of an absolute total loss. The vessel remained in specie comparatively uninjured, and in no immediate danger, and the very worst to be alleged of her was, that her recovery for navigable purposes was so doubtful, and the probable cost of floating her so large, that a prudent owner, uninsured, would have preferred to sell rather than attempt to remove her. In other words, she was constructively lost only. *Arnould* 851, 889, 937.

This the jury have found, and the presiding judge is of opinion that the evidence warranted such finding. And without saying that if I had been on the jury, I should have concurred in that view, I cannot say there is that in the evidence that would justify us in setting aside the verdict, on the ground that the loss was an average loss only.

On the other hand, the loss being only constructively total, a notice of abandonment would of course, in ordinary cases of insurance, require to be given within a reasonable time.

The facts in relation to the notice of abandonment are these—

The vessel was stranded on the 29th of October, and the owner received notice of this event on the next day, by telegram. Four or five days after he was informed by the same means, that the vessel had been condemned and ordered to be sold on the 9th November, and he was asked if any of the materials should be purchased on his account, to which he replied, that as the vessel could not be got off he did not require them. The vessel was sold on the 9th, pursuant to notice. On the

15th the mate arrived in Brigus, and on the 23rd the captain also arrived there, bringing with him the papers connected with the loss and sale, and on his arrival, virtually presented the papers to the secretary of the society and claimed upon them for a total loss. Both owner and secretary reside at Brigus, but until this claim was made no notice of the loss was given to the latter.

Now, assuming that under the authority of *Currie v. B. N. Insurance Co.*, 6 *Moore, P. C. C., N. S.*, overruling probably, *Parameter and Todhunter*, 1 *Camp*, this claim could be regarded as a sufficient notice of abandonment, it is clear, that were this the case of an insurance under an ordinary policy, it would have come too late, *Arnould*, 858.

It would have been the duty of the owner to have given notice in a reasonable time after he had been informed of the loss and had elected to regard it as total.

He was in this position, when, acting upon the information he had received of the condemnation and intended sale, he declined to purchase the materials, and it is impossible to say, that where the parties resided within a stone's throw of each other, a notice unnecessarily delayed for at least fifteen days, was given in reasonable time, or that after such neglect a claim could be sustained for a total loss.

It is however contended, that the sixth rule dispenses with the necessity for a notice of abandonment, where, as in the present case, its conditions have been fully observed; and after carefully studying the terms of this rule in connection with such others as bear upon the subject, I have arrived at the conclusion that the contention of the plaintiff in this respect must be sustained.

The rule runs thus—

“In the event of wreck it shall be the duty of the owner or master to agree with the salvors on the best terms possible for the benefit of the society; and in the event of a total or average loss by stranding or otherwise, the owner or master shall call in two or three surveyors, (members of the society if possible), and if it be deemed advisable, to employ an auctioneer to sell the wreck on the spot, for the benefit of the society; or if it should appear for their interest, he shall freight the same to Brigus, or as near thereto as possible for disposal. The master shall note, protest and furnish the secretary therewith, as also with an inventory of the wreck saved immediately on his arrival at home. The special surveyors in all cases of survey to make the necessary declaration according to law.”

Now let it be observed, that the word "wreck" in the first line plainly means wreck of the ship, the only subject of insurance with the society; that the word "total" in the fourth line being a generic term, *Arnould 850*, and being thus used in the third rule defining the losses for which the society would be answerable (unless indeed constructive total losses are not covered at all which is not pretended), includes constructive as well as actual or absolute total losses; and further, that when used to signify the former, it means, not a constructive total loss, perfected by notice of abandonment, but that state of wreck which would justify an abandonment, since it cannot be supposed, that when such a state of things exists, every thing is to remain in statu quo, until the master shall have communicated with his owner, and the owner with the underwriters.

Assuming then these premises, we find that in the event of such a loss occurring, the master is to call in surveyors, and if it be deemed advisable, he is to sell the wreck for the benefit of the society, or he is, if for their interest so to do, to remove it to Brigus for disposal.

Now the necessary effect of following the course here prescribed, a course previously agreed upon by insurer and insured, is by means of a sale, to deprive the owner altogether of all property or interest in his ship, and thus, to convert a constructive into an absolute total loss, by the very act of the society, who thus place themselves in the position of underwriters who have accepted and acted upon an abandonment regularly made to them, and have converted the proceeds of such abandonment to their own use.

How can it be contended that after such proceedings being had, by the society's express directions, given in anticipation of such an emergency, they can refuse to pay for a total loss they themselves have caused, on the ground of their receiving no notice of that being done, which they desired should be done, which they agreed to adopt when done, and the advantage of which, they stipulate that they are to receive.

Under the circumstances contemplated by this rule there seems to be neither object nor scope for an abandonment.

An abandonment is where the owner may and does elect to turn a partial into a total loss, and gives the underwriters notice of his election, that they may protect their own interest in the subject matter which is ceded to them, but here such election and cession are both made by the rule, they are agreed to before hand; the only election if any, open to the owner being

the right to insist, if he is so disposed, that the loss shall be regarded as partial only, and this election not being made, the proceedings by previous arrangement of all parties interested, become from the first a case of constructive total loss, with notice of abandonment waived, the owner or master being specially authorized by the society, to conduct the proceedings to a specific termination, for their protection and benefit.

In such a case a speedy notice of what had occurred might indeed be useful to the society in enabling them sometimes to control subsequent dealings with the wreck, but such notice would be very different both in meaning and effect, from an ordinary notice of abandonment, would imply neither election nor cession, would be altogether insufficient, under an ordinary policy of insurance, and is not required by the rules, which provide only for a notice to be given upon the masters return.

In my opinion the sixth rule is not as contended by Mr. Carter directory merely, empowering the master only to do that which by law he could do without it; it seems to me to go much further.

Where it applies, it completely inverts in case of a constructive total loss, the usual relations between insurer and insured.

Ordinarily, not only does the responsibility rest upon the owner to act *bona fide*; and by the master his agent, to form the best judgment upon the facts before him, but he has also to give a sufficient notice of abandonment within a reasonable time, and it is only when he has done *all* this, that the responsibility for the loss is shifted from himself to the underwriters, and the master becomes *their* agent and ceases to be *his*, but under this rule, when the facts shew a constructive total loss and a sale is "deemed advisable," the society become entitled to the control and consequently accept the responsibility and the master *ipso facto* becomes the agent of the society, and that by their own previous appointment and not by the subsequent abandonment of the owner; and when it is considered that the rules require that the master on his appointment shall be approved by the society and that some of their own members shall, if possible, be upon the survey by which the ship is condemned, the change of relations and of consequent liabilities, effected by this rule, appears not to be so unreasonable as might at first sight be supposed.

It may perhaps be contended that the use of the word "same" in the tenth line with application to the word "wreck" in the eighth line, shews that the sale directed by the rule is only of

the portable materials of the wreck and not of the ship, and that consequently no such conversion of a constructive into a total loss as would arise from a sale of the ship, is in fact contemplated; and doubtless the use of the word "same" in this connection does give some colour to this position. But if this inference were correct, we should have to conclude that while the society were solicitous about the settlement of salvage claims and the disposal of materials, and provided that two or three surveyors with the master should determine whether the materials should be sold upon the spot or removed to Brigus, they gave themselves no concern about the ship, the main subject of insurance.

Further, admitting that "wreck" means only portable materials, and not the whole wreck, the sale or removal of the former would produce the same effect upon the legal position of parties as if the hull were also included, since such sale or removal would, at least temporarily, cripple the ship and render her unnavigable, and being to be had as well in cases of total as of average loss, would in case of a constructive total loss, be such an exercise on the part of the society of dominion and control over the whole property, as would be consistent only with the rights and liabilities of an accepted abandonment.

We may therefore assume that this use of the word "same" is only a verbal inaccuracy very likely to occur in rules altered from time to time, with, possibly, not sufficient attention to the bearing of such alterations upon the context.

In the course of the argument it was suggested rather than contended, by the defendant's counsel, that the provisions of the fourth rule, might prevent the plaintiff from recovering;—but I have no doubt that these provisions apply only to the special cases mentioned in that rule, of which the case of the *Bredalbone* was not one.

The clause "no vessel shall be abandoned, &c.," is in fact incapable of universal application, and if it is to have only a special application, it can be only to those cases, with which, by position and language, it is closely connected.

I think the rule should be discharged, the plaintiff being in my opinion entitled to retain his verdict for a constructive total loss, notwithstanding the want of notice of abandonment.

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HON. MR. JUSTICE ROBINSON:

Mr. Justice Robinson delivered judgment orally, and said that he did not regret that the majority of the Court concurred

in judgment for the plaintiff—against his opinion—because the claim of the plaintiff seemed to be an honest one; nevertheless he could not deprive the defendant of his legal rights.

The verdict in favor of the plaintiff for £1250 as for a partial loss was unsupported by any evidence—the utmost that the proof established under that head was about half that sum. There was no ground for sustaining the allowance of interest made by the jury, and the remaining point in the rule was whether there was a “constructive total loss”?

It is a general rule in the law of insurance that in order to recover for a constructive total loss, the plaintiff must first abandon, and it makes no difference that what has been saved has been sold before any notice of the loss—a notice must be given with all reasonable promptitude, immediately after the assured had fair presumptive evidence of the loss, he must not await a final survey before abandoning, but must act on any reliable information he has, and Lord Ellenborough ruled that a delay of five days after the loss was known was fatal. *Hunt v. Royal, Ex. Ass. C. 5 M. & S.*

In this case well nigh a month elapsed before notice of abandonment was given which His Honor held to be too late, he bowed to the authority of *Corrie v. Bombay Ins. Co.*, determined in 1866 by the Judicial Committee which recognized a demand of payment for a total loss, as equivalent to a notice of abandonment, but that demand was not made in due time in the present instance. The only ground remaining to the plaintiff on which to sustain his verdict was whether the sixth rule of the club, to which both parties belonged, relieved the plaintiff from his legal liability to abandon, and deprived the defendant of the protection of the pre-existing law—this is the rule.

“VI—In the case of a wreck it shall be the duty of the owner or master to agree with the salvors on the best terms possible for the benefit of the society, and in the event of a total average loss by stranding or otherwise, the owner or master shall call in two or three surveyors, (members of the society, if possible); and if it be deemed advisable to employ an auctioneer to sell the wreck on the spot for the benefit of the society or if it shall appear for their interest he shall freight the same (mark “the same”) for Brigus or as near thereto as possible for disposal. The master shall note, protest and furnish the secretary therewith, as also with an inventory of the wreck saved immediately on his arrival at home, &c., &c.”

There is nothing in that rule which it was not the legal duty of the master, (or owner who should also be master) to observe, if no such rule had been in existence, except the trifling authority to freight the portable portions of the wreck to Brigus—the rule did not appear to His Honor to be introductive of a new duty on a master or owner, or to dispense with the observance by the owner of the duty of abandoning to the underwriters if he wished to convert a partial loss into a constructive total loss. The rule ought not to be warped for the purpose of extracting a meaning that is not clearly apparent on its face, and of depriving a defendant of an important legal protection of which he would only divest himself with clear intention and in plain language.

His Honor thought the rule *nisi* should be made absolute.

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HON. MR. JUSTICE HAYWARD :

This case was tried during the last sitting of the Northern Circuit Court at Harbor Grace, when a verdict was returned in favor of the plaintiff, and the learned Judge Robinson who tried the case granted the defendant a rule *nisi*, returnable into this court for a non-suit or new trial upon the points reserved, and the rule was argued in the last June term here.

The plaintiff's vessel, the *Breadalbane*, was insured in the Mutual Insurance Society of Brigus, of which the defendant was a member (the plaintiff being also a member), and previous to such insurance certain rules were mutually made and adopted for the regulation of the society, by which its members were to be *governed in all things*, and this action was taken against the defendant to test the liability of each member for contribution towards the plaintiff's loss.

The vessel whilst so insured and lying at Cow Bay, N. S., was driven on shore in a violent gale of wind and became what is termed in law a constructive total loss. The master called in surveyors and employed an auctioneer, and sold the vessel upon the spot *for the benefit of the society*, and also noted protest, &c., in accordance with their 6th rule.

The questions in this case for decision are—first, Does the present loss come within the operation of the 4th rule of the society? and secondly, If not, was the plaintiff bound under the 6th rule to have given legal notice of abandonment, and if so, was that notice given?

The 4th rule provides that, "Should a vessel, deserted by her crew in consequence of being in imminent danger of perishing, be afterwards recovered and found on a just appraisalment to have sustained damage to the amount of fifty per cent. on her original valuation, the owner may abandon to the society; but if the vessel be not so damaged, he shall take her again, and the society shall settle with the salvors for their interest in the vessel; but if the owner does so abandon, it must be declared within three days after the particulars of the loss or wreck of the vessel come to his knowledge."

I am of opinion that this rule does not apply in the present case, but was intended for a class of losses quite different, and of which we have had various instances, particularly during the seal-fishery, where the vessel is forced by the violence of the sea and ice in a position of great peril and danger, and where the crew if they remained on board her would be in imminent danger of perishing, but, as we have frequently known, the vessel escaped the danger either unhurt or with but trifling damage, and although she had been deserted and abandoned by her crew for a time, was afterwards recovered by them or by crews of other vessels, who became salvors and brought her into port. In the case under consideration the vessel was not deserted by her crew in consequence of being in imminent danger of perishing and *afterwards recovered*, but became a constructive total loss, and therefore does not come within the operation of this rule.

But the defendant also contends that if the 4th rule is not applicable to the present case, the plaintiff was bound under the general law of insurance to have given legal notice of abandonment before he could recover as for a total loss, which he contends was not given.

Upon this point I am of opinion that, although in an action on an ordinary policy, before a plaintiff would be entitled to recover he would be bound to show that he had given reasonable notice of abandonment to the underwriters; still I think that under the compact entered into between the parties to the suit, the necessity for the notice was waived.

The members of this society mutually agree to insure each other's vessel and bear reciprocally the proportions of loss—the risks insured against, and the obligations and duties of all are embraced in certain rules reduced to writing and signed by them, and by those rules all agree that they are to be governed *in all things*.

In the present case, all conditions precedent appear to have been performed on the part of the plaintiff, and he was *bona fide* insured at the time of the loss. After the loss happened he had to conform to the 6th rule. Then arises the question, Did he do so? In my opinion he did. In accordance with the obligations of that rule he called in surveyors, employed an auctioneer, who sold the wreck for the *benefit of the society*, noted protest, &c.

But it is contended that he should have also given notice of abandonment. Ordinarily he should, but I think that under the rules and circumstances of this case, such notice is dispensed with.

The object of a notice of abandonment is to enable the insurers, should they think proper, to take possession of the wreck and property as their own and dispose of it for their own benefit, and it does appear to me clear that by this 6th rule they waive the necessity for this notice by not only authorizing but making it incumbent upon the master to sell the wreck on the spot *for the benefit of the society*, or freight it to Brigus, &c.

It appears clear to me that the master, acting under the authority of this rule, does so as the expressly constituted agent of the insurers, and that the sale of the wreck by him for their benefit dispenses with the otherwise necessary notice of abandonment, for when he sells by their authority he divests the insured of the property and vests in the insurers. If notice had immediately been given, what could the society do more than authorize some one to take possession of the property and deal with it as they may dictate; and in place of this they specify by their own agreement who the person shall be to perform this duty, and they lay down a rule as to the course of action he is to observe in such case for their benefit, and the person they expressly appoint to this duty is the master of the vessel, who they approve of as master before the insurance was effected.

It appears to me, too, that outside the legal bearing of the rule, this was the intention of the parties, because they agree to be governed by their rules in all things, and in the 6th rule no mention is made of notice, whilst in the 4th rule it is expressly provided that in the cases of abandonment which it covers, the intention to abandon must be declared within three days after the particulars of the loss or wreck comes to the knowledge of the owner. This makes me more strongly of

opinion that the intention of the society was to waive the necessity for notice of abandonment in cases like the present by appointing the master as their agent, to act for them in the care and disposal of the wrecked property for their benefit.

The rule, therefore, in this case should be discharged.

With regard to the outside question of interest on the amount, it cannot be legally recovered.

*Mr. Pinsent, Q.C., and Messrs. Winter and McNeily for plaintiff.*

*Mr. Carter, Q.C., and Mr. Emerson for the defendants.*

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### RUTHERFORD v. DICKINSON.

1871, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Practice—Pleadings—Set-off—Demurrer.*

A, a merchant, employed B, a broker, for certain commission to be paid to him in that behalf to sell for A a certain quantity of fish, on the terms that B should sell the fish and place the proceeds of same in a bank to the credit of A, all of which B promised to do. B sold the fish, received the proceeds, but did not place same to the credit of A but converted them to his own use. In an action for the proceeds of the sale B pleaded a set-off; to which A demurred.

*Held*—(Hoyles, C. J., differing). That in such an action a set-off was admissible. In all actions of *indebitatus assumpsit* a set-off may be pleaded. A set-off may be pleaded to such portions of a declaration in *special assumpsit* as clearly claim a liquidated sum such as might be recovered on an action of *indebitatus assumpsit*.

In this case the plaintiff declares that he employed the defendant for certain commission to be paid to him in that behalf, to sell for the plaintiff 17½ qtls. of fish, on the terms that the defendant should sell the said fish and place the proceeds in the Union Bank, all of which the defendant promised to do.

The breach alleged is, that although the defendant sold the fish and received the proceeds \$617.72, *he did not* place such proceeds in the Union Bank, but converted them to his own use.

To this declaration the defendant pleads, as to the claim for the proceeds of the fish, a set-off, to which the plaintiff demurs; and the question is thus raised, can a set-off be pleaded to this declaration.

After a careful consideration of the authorities, I am of opinion that it cannot, and that the judgment should be for the plaintiff.

That a set-off may be pleaded, the claims on both sides must be such as resolve themselves into debts ascertainable with precision at the time of pleading, or are such as *indebitatus assumpsit* will lie for. Where either claim is unliquidated, or as it is termed sounds in damages, and requires the intervention of a jury for its determination, a set-off will not lie.—*Morley and Juglis, 4 Bing, N. C. 58.*

Upon the pleadings, the present claim is in my opinion, plainly unliquidated.

It is preferred, not for the proceeds of the fish, *eo nomine*, although these are mentioned with the other circumstances of the case as an element in the assessment of the damages, should the jury find the agreement and the breach as alleged, but for the damages, whatever they may be, occasioned by the breach.

The agreement is special. So far as the defendant is concerned, he undertakes in consideration of the fish being placed in his hands for sale, and of his receiving a commission for his service, to do a collateral act, not merely to pay the proceeds to the plaintiff, but to place them in the Union Bank. The breach is also special, not that the defendant did not pay the proceeds to the plaintiff, for that was not contracted for on either side, but that he did not place them in the possession of the third party, to whom they were payable.

For what purpose or with what object they were to be so placed does not appear; nor to what extent or in what manner the plaintiff was damaged by their being otherwise applied.

The damages may, as contended by Mr. Pinsent, be only the amount of the proceeds but they may be more or less. Whether the same, or more, or less, is purely a matter of proof, determinable by the jury after hearing the evidence; but if this be so they are necessarily uncertain, that is unliquidated, not therefore that for which *indebitatus assumpsit* would lie, and not consequently subject to a set-off.

In *Hardcastle v. Netherwood, 5 B. & Ald.*, it is ruled that if the contract declared on be such as might entitle the plaintiff to recover special damages, the statutes of set-off do not apply, even although no special damage be laid.

It is obvious that in the present case that plaintiff could, if the facts warranted it, allege and recover for special damages

as that by reason of the money not being paid into the Union Bank a contemplated purchase had been lost to him, or certain acceptance had not been met, and such like.

Further, if it were put to several persons to say under the facts stated in the declaration, what damages the plaintiff was entitled to, they might all reasonably differ in their conclusions, and if so can the damages sought be said to be certain or liquidated.

It was contended however by Mr. Pinsent, upon the authority of *Crompton*, and *Walker 3, Ellis and Ellis*, that the plea could be sustained, because a certain amount named in the declaration, and being the proceeds of the fish, was in fact, as he alleged, sought to be recovered, and that to such sum certain, as distinguished from the general claim for damages, the plea was confined.

I am, however, of opinion that neither *Crompton and Walker*, nor *Hardcastle and Netherwood*, sustain the application to the present case of the principles on which they were decided.

Both cases were actions for not indemnifying the plaintiff against the payment of bills accepted by them for the accommodation of defendants, and it was held, that as regarded the amount of the bills with interest and costs paid, a set-off would lie, but there, these amounts were distinct and separate parts of the very claim preferred, were specifically demanded as monies then due, as they were originally payable to the plaintiffs themselves, to meet *their* own acceptance.

The declaration was to this extent, nothing more than a special count for money paid by the plaintiff to the defendants use, and was of course subject to a set-off; because it is not competent to the plaintiff under ordinary circumstances, to evade the defendant's right in this respect, by declaring specially for a mere money demand, recoverable under the common counts, *Addison, 990*.

But in the present case, the proceeds of the fish were never payable (so far as appears) to the plaintiff; they are not specifically sought in the action, and are, as I have already observed, only referred to as a matter to be taken into account in estimating the uncertain damages which are what is really sought, and of which the proceeds are merely evidence. See *Luskie and Busbie, 13 C. B.*

Were I, however, to admit that the proceeds of the fish were *eo nomine* specifically sought to be recovered, I should still hold that there can here be no set-off, on the following grounds.

In *Addison*, p. 990, it is broadly laid down that if an agent who has got possession of the money of his principal commits a breach of duty by retaining it, and the principal bring a *special action* against him for breach of duty, the agent cannot plead a set-off.

The same doctrine is laid down in *Chitty on Contracts*, p. 729, and in *Bullen & Leake*, p. 574, and is in my opinion established beyond question by the cases of *Colson and Walsh*, 1 *Esq.*; *Thorpe and Thorpe*, 3 *B. & Ad.*; *Hill and Smith*, 12 *M. & W.*, and *Bell and Carey*, 8 *C. P.*; and applying this rule to the facts admitted on the pleadings, it seems clear that the defendant having received the fish by way of bailment or trust, upon a condition which he promised to observe, of specifically applying the proceeds to a collateral purpose designated by the plaintiff, cannot be permitted to appropriate the proceeds to the discharge of his own previous claims upon his principal.

The case of *McGillivray v. Bremer*, 2 *C. & P.*, may at first sight seem to be at variance with these decisions, but that case (where it was held that an undertaking not to set-off a given debt against the proceeds of timber, delivered to the defendant for sale on that condition, was not binding upon him) was one in which the proceeds were to be paid, not for a collateral purpose, but to the plaintiff himself, it was decided before the three cases last mentioned by a judge who, when sitting in *Thorpe and Thorpe*, did not refer to it as conflicting with the opinions of the other judges in the latter case, and as respects any application it might be supposed to have to the circumstances of the present action, must be regarded as over-ruled.

Had the present plaintiff sued in *indebitatus assumpsit*, he would under the same authorities have been subject to a set-off; but he has not done so, and equity would justify him in availing himself of the advantage which in declaring specially the law in my opinion gives him.

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HON. MR. JUSTICE ROBINSON:

I AM of opinion that this demurrer should be overruled.

At first I supposed that the plea of set-off which had been demurred to, had been to the whole declaration in which event it would unquestionably have been bad, but I find that it is carefully confined to so much only of the first count as relates to the proceeds of fish, which proceeds are declared to be \$613.72.

I felt a difficulty in seeing how the defendant should be allowed to retain money for his own debt, when he had promised to pay it into the Union Bank for the use of the plaintiffs, but the authorities upon that point seem to be conclusive as to his legal right so to do, and I am bound by them. Before the reign of Geo. 2, a defendant, having a claim against a plaintiff, could not set-off such claim but was driven to a cross action; to apply a remedy, and to prevent such circuitry the statute, 2 Geo., c. 22, was enacted, and it permits "mutual debts" to be set-off one against the other.

A multitude of cases has arisen under this statute, each varying in its circumstances, and governed sometimes by very minute differences.

I do not pretend to reconcile some of them with others, but I deduce from the whole the following general principles of law as applicable to the subject of set-off, and by which the present question should be determined.

1st—That a set-off may be pleaded in all actions of *indebitatus assumpsit*

2nd—That a set-off may be pleaded to such portions of a declaration in *special assumpsit* as clearly claim a liquidated sum, such as might be recovered on an action of *indebitatus assumpsit*, *Hardcastle vs. Netherwood*, 5 B. and Ald.; *Hill vs. Smith*, 12 M. and W.; *Crampton vs. Walker*, 3 Ell and Ell.

3rd—To an action or count in trover no set-off is pleadable.

Let us see how far the facts set forth in this declaration, bring it within these general principles applicable to this remedial statute.

In the first count the plaintiffs declare that they employed the defendant to sell 174 qtls. of fish for them, and desired him to place the proceeds thereof in the Union Bank, all of which he promised to do, and that although he sold the fish and received the proceeds amounting to \$613.72, he refused to place them in the bank and applied them to his own use.

The declaration then contains a count in trover for the conversion of the 174 qtls. fish and concludes with a claim for damages the result of both branches.

To that part of the plaintiff's demand which refers to \$613.72, Mr. Dickinson pleads a set-off, of a greater debt due to him by the plaintiffs and to the residue the general issue; the plaintiffs demur to the plea of set-off as inapplicable to a special action like the present, and thus the question arises for our decision.

There is no doubt that part of plaintiff's demand sounds in damages, but there is equally little doubt that the substantial object of the action appears from the pleadings to be to recover the said sum of \$613 72, which the plaintiffs themselves liquidate to the cent, and which they might recover in an action in *indebitatus assumpsit*.

To such a demand, the statute of set-off applies, and to deny the defendant the right of pleading it by reason of any technical ground would be to allow *form* to usurp the place of *substance*, and obstruct rather than promote justice.

If the contract set out in the declaration had alleged that the defendant had agreed to pay the money into the bank expressly to be applied to a specific object, *e. g.*, to take up a particular bill of exchange, the rights of other parties, and other considerations would arise, and to such a case the power to plead set-off might be questionable—see Bramwell, J., *arguendo* in *Bell vs. Carey, 8 C. B.*, but here no such state of facts is alleged, and we cannot travel out of the record.

It is true that in Mr. Dickinson's undertaking to pay the money into the Union Bank, such payment is not expressly declared to be "for the use of the plaintiffs," but the legal effect of paying in the money in the manner referred to in the declaration, would be to make it *for the use of the plaintiffs*.

That such would be the effect will be apparent when the transaction is tested by considering what would be the liability of the bank. Suppose Mr. Dickinson placed on the bank counter \$613.72, simply saying and not adding one word more "this is the value of fish belonging to Messrs. Rutherford which I sold for them, and which by their directions I pay in here." Would not the manager without a moment's hesitation place it to the credit of Messrs. R.'s account. I think so; when the money got into the bank it would become subject to the claims of the bank in relation to their dealings with the Rutherfords, but they would be the owners of it, and could sue the bank for it, as for money "had and received to their use."

In other words the money practically was payable by Mr. Dickinson to Messrs. Rutherford, through the Union Bank.

In the earlier cases reported upon this subject the law did not permit—as it now permits a joinder in the same declaration of a count in trover, with a count in *assumpsit*, and to meet the present practice the doctrine of pleading various pleas to different parts of the declaration seems to have grown by degrees, until it has been finally settled as in *Crampton v. Walker*.

Some of the observations of Chief Justice Cockburn and of Mr. Justice Hill in that case are apposite to the one now under our consideration.

The Chief Justice says "once it is seen that a declaration contains mixed up in the same count, distinct causes of action, some for liquidated claims, others sounding only in damages, the defendant must be entitled to separate them and plead accordingly." Mr. J. Hill observes "Mr. Wellby contends that the plaintiff can avoid a plea of set-off by declaring on a special count, the Irish judges in *Hamilton v. Gould* advert to that point, and Gibb, C. J., in *Birch v. Depeyster* said "that if a plaintiff seeks to recover in a special assumpsit, money which might have been recovered by him as "money had and received for his own use," he shall not deprive the defendant of his set-off by declaring specially," and Mr. J. Hill adds "it is certainly consonant with justice that the plaintiff should not be allowed by declaring in a special form, to oust the defendant from a good and legitimate ground of defence."

For all these reasons I think judgment ought to be entered for the defendant on this demurrer.

Mr. Justice Hayward concurs with me in this opinion, and that judgment should be for the defendant.

*Mr. Whiteway, Q. C., for plaintiff.*

*Mr. Pinsent, Q. C., for defendant.*

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1871, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Incomplete gift—Parol evidence of trust—Onus probandi—Conflicting testimony.*

For several years previous to 1866, complainant's deceased wife and her sister resided with their aunt, one Mrs. O'Brien. In July, 1866, Mr. O'Brien, after informing his wife he intended making her nieces a present, called them and delivered to each a government debenture for £500 sterling, bearing interest at 5 per cent. per annum, writing their names in pencil in the corner of their respective debentures. On the same day Mr. O'Brien took his nieces to the Receiver General's office, where upon presenting their debentures a half year's interest was paid to each. The debentures remained in the possession of the nieces for three years, when they were handed back to Mr. O'Brien for safe keeping. One half the interest for two consecutive half years was paid to the nieces by Mr. O'Brien, but after this no further payment was made to them, and in 1868 Mr. O'Brien without consulting his nieces sold the debentures.

On a bill filed by one of the nieces to establish an alleged trust—

*Held*—Under the circumstances there had been no gift to or valid declaration of trust for the nieces. The transaction between the parties was a mere bailment of the documents, and no trust of the fund was or could be created by it.

*Held*—There was a trust created for the interest received, or which might have been received on the debentures.

THE bill in this case is filed for the establishment of an alleged trust and charges, that Margaret Annie Hawe, who in September, 1857, became the wife of complainant, was possessed as of her own property, of a debenture of the Government of Newfoundland, of the amount of five hundred pounds sterling, bearing interest at the rate of five and one-half per cent, per annum. That this debenture was delivered by her to the said Laurence O'Brien for safe-keeping, and that he in 1866 wrongfully sold the same and converted the proceeds to his own use.

That the said Margaret Annie Hawe herself received from the Government some of the interest arising on the debenture, and that some more of it was collected and paid to her by the said Laurence O'Brien, and that the remainder of the interest was allowed to accumulate in his hands for her use. That complainant's said wife died in 1866, and the said Laurence O'Brien in April, 1870—and that since his death, complainant has, but without effect, applied to defendant who is the executor of said Laurence O'Brien, for payment of the principal and interest due on said debenture.

The bill prays that the said Laurence O'Brien may be declared to have been a trustee of complainant's said wife for the said debenture and the interest accruing thereon, that an account

may be taken of the amount due and the same paid over to complainant, either as representing his deceased wife, or as assignee of his own insolvent estate, and that he may have such other relief as may be equitable.

The answer denies that the said Margaret Annie Hawe ever was the owner of the debenture referred to, or ever received any of the interest arising on it except by way of gift of such interest and as a matter of kindness on the part of the said Laurence O'Brien; denies that she ever had possession of any such debenture except as the property of said Laurence O'Brien and for his use, or that he ever was a trustee for her of the same in any respect, or that there was any valid consideration for any supposed transfer of such debenture by the said Laurence O'Brien to her; admits the sale of the debenture by him, but justifies the sale on the ground of its being his sole property.

Upon the depositions, the principal facts appear to be, that in the year 1866 and for several years previously, complainant's deceased wife, then Margaret Annie Hawe, with her sister, Mary Josephine, afterwards Mrs. Quill, resided with Mr. and Mrs. O'Brien; Mrs. O'Brien being their aunt. That on some day in July in that year, Mr. O'Brien, after informing Mrs. O'Brien that he intended making her nieces a present, called them into his breakfast room, and there delivered to each a government debenture for £500 sterling, bearing interest at £5½ per annum, first writing their names in pencil in the corners of their respective debentures.

On the same day, he, with Mrs. O'Brien, took his nieces to the Receiver General's Office, where, upon their presenting their debentures, a half year's interest was paid to each.

At the time of Mr. O'Brien giving the debentures to his nieces, he inquired of Mrs. O'Brien how much of the interest would be enough for them to spend, and observing that he thought one-half would be sufficient for that purpose, recommended that the remainder should be allowed to accumulate at interest, offering himself to invest it for them, and in this suggestion the nieces appears to have concurred.

The debentures remained in the possession of the nieces for about three weeks, and it then appearing that they were not sufficiently careful of them, Mrs. O'Brien recommended their being delivered to Mr. O'Brien for safe-keeping. Mr. O'Brien accordingly took them at the request of his nieces and placed them in Mrs. O'Brien's drawer, where they remained for some years.

One-half of the interest, for two consecutive half years apparently, was subsequently paid to his nieces by Mr. O'Brien, but after these no further payments were made to them, and in 1866, Mr. O'Brien without consulting his nieces or informing them of his intentions, sold these debentures with others through the agency of the Union Bank.

During Mr. O'Brien's life time no claim was made upon him for any further interest, nor did the nieces or their husbands make any inquiry of him as to what had become of the debentures, but upon his decease, the present suit was instituted against his executor.

During the last term the case was very elaborately and ably argued by Mr. Pinsent, Q. C., for complainant, and by Mr. Carter, Q. C., for defendant; Mr. Pinsent contending, that the evidence established a perfect gift of the debenture to his client's wife, or at least an equitable assignment which the court would perfect; or, that a varied contract had been proved whereby Mr. O'Brien in consideration of the subsequent receipt of the debenture had become liable to pay the principal with interests thereon to the use of Mrs. Reddin's representatives; or, that the circumstances of the case created a trust in Mr. O'Brien, the performance of which by his executor, equity would enforce, and that upon one, some, or all, of these grounds, he was entitled to a decree for the amount of the debenture with compound interest. Mr. Carter, on the other hand, maintained that the alleged gift of the debenture was altogether imperfect and of no effect, that no trust had been established by the evidence, that no legal liability on Mr. O'Brien's part to pay over principal and interest had been shown, and that the alleged trust or assignment being purely voluntary could not be enforced.

The case is one which involves the right to a large sum of money, and presents for adjudication some points of considerable difficulty. We have therefore given it much careful consideration, and have arrived at the conclusion that the complainant is entitled to a part of what he seeks to recover.

The debenture which is the subject of the suit, was one issued by the local government under the provisions of the Act of the Legislature 19 Vic., cap. 14, the last section of which declares that debentures issued under its authority shall be assignable and transferable by endorsement thereon.

Being a mere acknowledgement of indebtedness, with a promise to pay to the party entitled the sum for which it was issued with interest, it was of course a chose in action, and consequent-

ly could be assigned at law, only in manner prescribed by the Act; and where this formality was not observed, an executory contract or equitable assignment of it, could only be enforced in equity when made upon a valuable consideration.—*Story Eq. Jur. 5. Lewin on Trusts, p. 62.*

In the present case no valuable consideration passed from the complainant's wife to Mr. O'Brien. and there was consequently no equitable assignment to which the court could give effect. It became therefore a matter of primary importance for the complainant to establish, if possible, a transfer at law by shewing that a regular endorsement as prescribed by the Act, had been made by Mr. O'Brien, with the object of perfecting his intended gift.

A close examination of the evidence had satisfied us, not merely that the endorsement is not clearly proved, but that in fact it never was made.

The evidence adduced to show the endorsement is that of Mr. Smith of the Union Bank and of Mr. Patrick Brazil.

Mr. Smith states, that some time before 1866, the debenture in question, which appears to have been subsequently identified by the name of A. Hawe being written in pencil on the corner, was with three others of like amount deposited with him by Mr. O'Brien; but whether to collect the interest on them, for sale, or as security for advances, he is not certain. That all four were in or about January, 1866, sold by him on Mr. O'Brien's account, and that when sold, an endorsement by Mr. O'Brien was certainly made upon all of them, but when that endorsement was written he was unable to state.

For either of the purposes for which the debentures were deposited with the bank, an endorsement would appear to necessary, and a fair presumption might therefore arise that all four were then endorsed, but if such endorsement was not then necessary, it cannot be presumed from the bare fact of the debentures being found endorsed when sold, that they had been endorsed ten years before.

Mr. Brazil states, that on one occasion being in Mr. O'Brien's office, the latter urged him to do something for his nieces, they being also nieces of witness. That Mr. O'Brien then informed witness, that he had made each of them a present of a debenture note for £500 sterling, and at the same time exhibited to witness the back of a paper or parchment, upon which Mr. O'Brien's name, in his own handwriting, was endorsed in pencil.

Now, if the document exhibited *was* a debenture, which seems very doubtful, the uncertainty as to which of the two it *was* would render that fact by itself valueless; but, besides this difficulty, it might be fairly argued that an endorsement, to be effective, must be made with intent to pass the property, and if made for a permanent object such as that, would most likely be made in a permanent manner with ink, and not in pencil; and although an endorsement in pencil would doubtless be sufficient to pass the property, if shewn to be made with that intent, such a mark as that described would more resemble a mark for temporary identification than a formal endorsement for a matter of such importance as transferring the fund which the debenture represented; further, this conversation would appear to have taken place about the time when the debentures were, as above mentioned, produced at the Receiver General's office, and the assumption that at such time, or for a long time afterwards, any such endorsement existed on either of the debentures, is altogether inconsistent with the evidence of Mrs. O'Brien and Mrs. Quill.

These ladies state that for several years after the time of the supposed gift the debentures lay in Mrs. O'Brien's drawer, where they frequently saw and handled them, and where Mrs. O'Brien once read them. They depose to the pencilled endorsement of the supposed owners' names (which does not appear to have been seen by Mr. Brazil, though shewn *aliunde* to exist as to the debenture in question to this day), and yet they do not say one word as to any other endorsement. Now, when it is considered that both ladies were complainant's chief witnesses, and doubtless were examined beforehand as to their ability to speak upon a point so material for the plaintiff to establish, the conclusion is, to my mind, irresistible, that during all the time the debentures were kept in the drawer, including the time of the conversation in Mr. O'Brien's office, there was no endorsement upon them. Moreover, the presumption is not unreasonable that Mr. O'Brien, without at all meaning anything in derogation of his intended gift, purposely abstained from endorsing the debentures. It would naturally occur to a man of his intelligence and business habits that by endorsing them the fund would be endangered in case of the accidental loss of the documents, and any immediate disposition of them by his nieces not being then in contemplation, and endorsement for the purpose only of passing the property to them being an act which could be performed at any time, such en-

dorsement would naturally be postponed until occasion should render it necessary.

On the other side, Mr. Stafford swears that for some years previous to their deposit in the Union Bank he collected the interest on Mr. O'Brien's debentures, including the one marked "M. A. Hawe," and that during that time there was no endorsement on either of them.

It thus appears to be plainly proved that the debentures were not endorsed by Mr. O'Brien so as to transfer the legal interest in the fund to his nieces. The intended gift was, therefore, imperfect, and being so cannot, for the reasons already given, be completed by a court of equity; and this branch of the complainant's case consequently fails.

As to the third ground upon which Mr. Pinsent relies, it seems to us impossible to contend that the mere receipt of the debenture by Mr. O'Brien from his niece in the manner described raised an implied contract on his part to pay the principal and interest of the fund to her. The circumstances create no such liability. The only legal obligation here arising is one of bailment merely, a contract to return the chattel which had been entrusted to him; a contract not, under the circumstances of this case to be specifically enforced in equity, but for the breach of which the only remedy (if any) is in a court of law.

We have, therefore, now only to consider whether, upon the facts stated in evidence any, and (if any) what trust of the fund represented by this debenture has been created which the court ought to enforce.

If a trust of the fund was created it must, as regards the present case, have been in one of two ways; either by the niece transferring the fund to Mr. O'Brien to be held by him for her use, or by Mr. O'Brien voluntarily, and, independently of any transfer, constituting and declaring himself a trustee for her of the fund regarded as his own property.—*Lucin on Trusts*, p. 55.

As to a trust being created by the first mode, the niece was the proprietor, if of anything, of the chattel only—the fund itself, originally Mr. O'Brien's, had not, as we have seen, passed from him to her, she had no control over it, and consequently could not transfer it to him in trust for her or otherwise, and he could not receive from her what was already his own—she may have supposed that in delivering the debenture she delivered the fund, and he may have supposed that in receiving the debenture he received the fund, but no obligation could be

founded on this mistake. Mr. O'Brien would no more become a trustee of the fund in consequence of it than one would become responsible for gold where he had only received brass, simply because bailor and bailee had both mistakenly supposed gold to have been delivered. It cannot, I think, be denied that had Mr. O'Brien the next day restored the debentures to his nieces, the trust, which as the bailee of the chattel he had assumed, would have been discharged, and yet the fund would have remained his own property as before; and, if so, how would his wrongfully (if it were so) using the debentures to facilitate the sale of that which was his only confer a right to the fund upon his nieces.

The transaction between the parties was, in our opinion, a mere bailment of the document, and no trust of the fund was or could be created by it.

With regard to a creation of a trust by the second mode:

If a party deliberately constitutes and declares himself a trustee of any part of his own property for the benefit of another, equity will undoubtedly compel him to carry out his intentions, if definitively and completely declared, and that although no consideration passes, and although the declaration, if of personal property, is by words only.—*Lewin, p. 55.*

That such should be the law may perhaps be matter of regret—(see *Lock & Jones, 1 Law Rep., Ch. 1865,*)—but that it is so is now too well settled to be disputed.

Such a declaration of trust, however, must be clear, distinct and unequivocal, not a matter of forced inference or of doubtful construction—*Roberts & Roberts, 12 Jur., N. S., 971; Lock & Jones, supra*; and it is also a rule that an imperfect gift cannot be turned into a declaration of trust, as, if inoperative for one purpose it is so also for the other.—*Milroy & Lord, 8 Jur., N. S., 806.*

Subject then, to those principles, does the evidence in the present case shew that at any time subsequently to the time of the imperfect gift, such a declaration of trust with respect either to the principal sum of £500, or to the interest that was to accrue from it, was made by Mr. O'Brien, whether by words or by his acts.

In relation to the principal sum, the evidence relied upon amounts to this only—that Mrs. O'Brien, fearing that her nieces did not take sufficient care of the debentures, advised their delivery to Mr. O'Brien for safe-keeping; that acting upon this advice they gave them to him for that purpose, and

that for such purpose only so far as appears he received them, placing them in the drawer to which Mrs. O'Brien and her nieces had access, and where they remained for years afterwards until they were removed to the Union Bank for deposit or sale. Nothing further appears to have been said or done by Mr. O'Brien in relation to them, except to receive the interest upon them and to appropriate part of it to the use of his nieces, an act which though very significant as regards the interest itself, cannot, except by a very strained and forced construction, such as is not permitted for the declaration of a voluntary trust, be made to affect the principal.

Apart from this circumstance, where in the particulars we have mentioned do we find Mr. O'Brien creating a new obligation, beyond the safe-keeping of the debenture, constituting and declaring himself a trustee of the fund for his nieces; saying in effect, that he held it and would apply it to their use.

That one may constitute himself trustee for another in the manner here contended for, two things must concur in him—a present intention to appropriate something *of his own* to the use of another, and an unequivocal declaration of that intention by words and acts. Now at the time Mr. O'Brien received the debenture and placed it in the drawer for safe-keeping, he either was aware that it did not unindorsed represent that which was his niece's property, or he was not. If he was, what is there in such reception and deposit to shew that there then took place in his mind and intentions such a change as the declaration of a trust necessarily implies? If he was not, but on the contrary supposed the fund to be already his niece's, where was the necessity, reason or motive, for a formal re-assertion of what he and all believed to be the fact, and as to which no question had been raised or doubt suggested, or how could he declare a trust *as of his own property* of that which he regarded as the property of another?

Of the principal sum, then, we are of opinion that there is not sufficient evidence to establish either the creation of a trust by the joint act of the two parties, or a voluntary declaration of trust by Mr. O'Brien alone. The interest of that fund stands, we think, in a different position.

It is clearly proved that besides the first payment of interest at the Receiver General's office, a circumstance which it may be contended belongs rather to the occasion of the imperfect gift than to that of the suggested trust, Mr. O'Brien on two

separate and apparently consecutive occasions paid to his nieces one-half of a half year's interest on the debentures.

Now, although an imperfect gift cannot, as has been shewn, be in itself converted into a declaration of trust, the circumstances surrounding it may properly be taken into account for the purpose of giving a construction to the subsequent occurrences, relied on as in themselves constituting such a declaration; and with the light as to Mr. O'Brien's intention thus afforded, and coupling his advice and offer as to the accumulation of one-half of the interest with his subsequent payments of the other half, we are of opinion that he intended to and did appropriate the interest to accrue on the debentures to the use of his nieces, and that he declared that intention in a plain unequivocal and definite manner.

We must therefore declare Mr. O'Brien to have been trustee for those whom the complainant represents of the interest received, or that, but for the sale of the debenture, might have been or might be received upon it, up to the time at which the principal sum would become payable, and as the complainant has succeeded in part of his claim we give him his costs of suit.

We refuse interest upon monies past due, for the reason so far as I am concerned, that I am of opinion that, although no case of acquiescence has been made out against the complainant, he acted improperly and was guilty of laches in not preferring a claim in Mr. O'Brien's lifetime, when the doubt which more or less attends adjudication on disputed claims after the death of the principal witness, himself a party interested, might have been avoided.

Let a decree be made in accordance with these directions.

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HON. MR. JUSTICE ROBINSON:

Mr. Justice Robinson, after referring to the leading facts, said, that the struggle in this case is between two parties whose estates are derivative, both claim from the free bounty of the same relative, and by the prayer of his bill the plaintiff seeks to transfer from the estate of testator's nephew £500 stg., with interest, to the estate of the testator's niece. Both are in equal propinquity to the late Mr. O'Brien; and each relies upon his strict legal rights.

To the correct determination of those rights I have given my careful consideration. It is settled by decisions too numerous to be questioned, that an imperfect gift of a chattel can-

not be carried into effect by a court of equity, that a gift is imperfect if anything remain to be done by the donor, and that where a court could not make an order against the testator, in relation to such matter if living, it can make none against his representative — *Ex parte Daboste*, 18 Ves. ; *Edwards v. James*, 1 M. & C. ; *Milroy v. Lord*, 8 Jur. N. S. ; *Jones & Lock*, 1 Law R.

The plaintiff's contention is, first, that the late Mr. O'Brien made to his niece Miss Margaret Annie Haw, afterwards Mrs Reddin, a valid gift of a Government debenture for £500 stg., bearing 5½ per cent. per annum interest, or secondly, that he constituted himself a trustee of such debenture for the use of his niece and that his estate must be held liable for principal interest and compound interest on her behalf.

To constitute a valid gift of that debenture it should not only have been delivered to the donee, but it should have been also endorsed by him to her as it is only by endorsement that such instruments are assignable. The statute 18 & 19 Vic., which authorizes the issue of the debentures, directs that they may be assignable by "endorsement thereupon," and that mode must be observed. — *Jones v Jones*, 5 Exch.

The onus rests upon the plaintiff of establishing the affirmative of every fact necessary to entitle him to the relief he seeks.

The evidence of Mrs. O'Brien and of Mrs. Quill satisfies my mind to this extent, that Mr. O'Brien had led his nieces, Mrs. Reddin and Mrs. Quill, to believe that he had given each of them a debenture for £500 stg., and perhaps at the time, he intended to confer upon them that handsome gift, but he did not complete it, and for want of such completion no property passed to the intended donee.

The evidence may possibly suffice to prove that the testator delivered the debenture to Mrs. Reddin, although that fact is rendered somewhat doubtful by the testimony of Mr. George Hayward, but the evidence is quite insufficient to establish the fact of endorsement of it to her.

There is no proof except that of Mr. Brazil (if his evidence refers to this debenture) that Mr. O'Brien did endorse it to his niece, whilst there is strong evidence that he did not.

It cannot be supposed that upon a point so vital, enquiry was not made of Mrs. O'Brien and Mrs. Quill, yet, of neither is the question asked, and neither states that Mr. O'Brien's signature was to the endorsement, whilst Mrs. O'Brien who "saw the debenture for some years afterwards in the drawer, and

often looked at it, and read it over," tells us what was endorsed; she asserts that "what was put in pencil and what I saw written on the debenture was Margaret Annie Hawe."

Mr. Brazil, also a witness for the plaintiff, does not appear to have been asked if he saw the debenture, or any endorsement upon it, and it was only on his cross-examination that he refers to Mr. O'Brien's name; he states "O'Brien shewed me a paper or something like a paper, with Laurence O'Brien written on it in pencil. I did not take the paper in my hands, all I read and saw was Laurence O'Brien, he took the paper and shewed the back of it to me. Laurence O'Brien was in his own handwriting." It is true Brazil states that O'Brien had told him that he had given two debentures to his two neices, but there is nothing to shew that the paper produced was one of them, and it is doubtful what it really was. If it was either of the debentures, his evidence is not consistent with the evidence of Mrs. O'Brien and Mrs. Quill, for they speak of other writing in the endorsement which Brazil did not see, and he speaks of the name which they did not see. Mr. Brazil increases the doubt by the exceeding vagueness of his recollection; he says "I cannot say when this transaction occurred, whether two, three, four or five years ago, or when it was."

In addition to the want of affirmative evidence of O'Brien's name on the endorsement, is the positive statement of Mr. Geo. Hayward, and the inference to be fairly drawn from such evidence. He has been for twenty years in the office of the Receiver General, and from his official experience and accuracy his testimony is well entitled to weight; he remembers the occasion when the parties went to the Custom House to receive the interest on the debentures, immediately after the alleged gift, it was on the 3rd July, 1856; he says "Mr. O'Brien handed me the debentures he then held, and requested me to fill up two separate cheques, in favor of the two Miss Hawe's for the interest." In his cross-examination he repeats that "it was Mr. O'Brien who handed me the debentures, and I handed all the debentures back to him, and he adds that O'Brien afterwards received the interest periodically due on them, and that Miss Margaret Hawe never received any other than that one cheque. In this there is a conflict of evidence between him and Mrs. O'Brien and Mrs. Quill,

Mr. Hayward states, that for many years it had been the custom to endorse on the debentures the payment of the interest due on them, and that up to 30th June, 1865, interest was

paid on the debentures on Mr. O'Brien's account, from which I infer that up to that time they must have remained unendorsed, and the apparent property of O'Brien.

On the whole, the evidence totally fails to establish the endorsement of the debenture by Mr. O'Brien to Miss Hawe, or that he parted with the legal ownership of it, or conveyed to any one any right in law to it; the gift, both of the document and of the money which it represented being imperfect was inoperative and the ground of the complainant's suit, "that M. A. Hawe was possessed in her own right, and as her own property of a debenture" seems to fail so far as any rate as the principal money or the debenture itself is concerned.

2nd.—The next question that arises is, did Mr. O'Brien by any subsequent act or declaration, constitute himself a trustee of M. A. Hawe, for the principal represented by the debenture or the interest thereon?

It is not to be denied that a man may even by word of mouth, and even without any valuable consideration, constitute himself a trustee of a sum of money or a personal chattel, for the use of another, but it requires the most unmistakable declaration or unequivocal act to create such relation; no man would be safe if doubtful words or acts of mere friendship passing between him and the members of his family at his own fireside, should be warped into a declaration of trust which he may never have contemplated, and that by careless conversation or social courtesies he should be discovered to have unconsciously divested himself, without any valuable consideration of his property, in favor of another who may have paid nothing for it.

The most eminent of English judges have regretted that mere words should ever have been allowed to have had such an effect, and all are agreed that nothing short of unquestionable evidence of a clear intention expressed by unequivocal language, or acts that will admit of no doubt, will warrant a court in establishing such a trust.

Now, how far does the evidence on this point go?

Bearing in mind that an invalid gift cannot be converted into a valid declaration of trust. (*Milroy v. Lord*, 8 Jur. N. S. 806.) I do not find that after the transaction in the breakfast room, Mr. O'Brien said one word respecting the debenture, or the money it represented, except once to recommend that it be entrusted to the safekeeping of Mrs. O'Brien.

It was the ladies who suggested that it should be placed in Mr. O'Brien's drawer and in his custody for safe-keeping—to which he appears tacitly to have acquiesced, but without having given any undertaking or assuming any express responsibility, or in fact saying one word upon the subject. He seems merely to have complied with the wish of those about him to take care of a debenture which in law was his own property, and he did not use a single expression from which it could be gathered that he intended that the said debentures should cease to be his own property. Where then is any *declaration* of trust? And as to his *acts*: he treated these two debentures in the same manner as he used his other debentures, received the interest therefor for ten years—up to 1865—without ever having been called to account, and eventually sold them for the purpose of his trade.

It is worthy of observation that when Mrs. Quill returned to this country from Canada in 1866, she was informed by Mr. O'Brien that he had been obliged to sell all his debentures owing to commercial difficulties, and even then she does not appear to have made complaint or claim on foot of any of them being her property or the property of her sister; it would have been natural for her to have said, where so large a sum was involved, "Surely, Uncle, you have not sold the debenture you gave me, or that which you gave my sister," but she said nothing! I can understand and appreciate the motives of delicacy which imposed silence upon this lady towards a relative who had been kind and doubtless was dear to her, but the fact of her silent acquiescence remains, and is too important to be overlooked. Adverting again to the stringent rule above referred to, and to the great peril of permitting an oral declaration of trust to be created, except upon the plainest evidence of unequivocal words, I must hold that in my judgment the complainant has failed to fix upon Mr. O'Brien the relation of a trustee in respect to this debenture or the principal thereof.

I have considered what light the transaction in the breakfast room might properly be allowed to reflect upon the subsequent act of Mr. O'Brien in taking charge of the debenture—how far the motives by which he seemed to have been influenced when he handed the document to his niece would evince the intention with which he afterwards received it. I pondered over this point and I have arrived at the conclusion that still there is no sufficient evidence of a declaration of trust regarding the principal; a court ought not to splice together disjointed frag-

ments of deeds and words for the purpose of constructing by inference a relation which should only be recognized when the evidence creating it is clear beyond the power of misapprehension.

3rd—It remains to be considered whether as regards the annual interest on the debenture, the evidence carries Mr. O'Brien's responsibility further, and I am of opinion that it clearly does; he distinctly spoke of the interest as the property of his niece on one occasion—at least he permitted her to receive it at the Custom House, he advised her not to spend all of it, but to allow it to accumulate in his hands to a time when it might be more required by her, when it might serve her for pin-money, and he expressly promised to take care of it for her; here is a clear declaration and assumption of a trust, and for the interest received and to be received on that debenture it must be decreed that Mr. O'Brien made himself trustee for Margaret Annie Hawe (afterwards Reddin), and for such amount the defendant as executor, and the estate of such executor, must be held liable to the representative of Mrs. Reddin.

The case of *Milroy v. Lord*, 8 Jur. N.S. 809-810, recognizes a distinction between principal money and the interest accruing thereupon, and is a guide in reference to this trust. I quote the language which Sir J. G. Turner there used, "Although the plaintiff's case fails as to the capital of the bank-share, there can I think be no doubt that the defendant made a perfect gift to Mrs. Milroy (then Miss Dudgeon) of the dividends upon these shares."

The estate of Mr. O'Brien does not appear to have profited by compound interest on the amount he received, and on that account as well as others, I do not think that the defendant should be charged for compound interest.

A reference to the master must go, &c., &c.

*Mr. Pinsent, Q.C.*, for complainant.

*Mr. Carter, Q.C.*, for defendant.

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1871, July. HON. MR. JUSTICE HAYWARD.

*Insurance marine—Mutual Insurance Society of Brigus—Construction of rules—Transfer—Bona fide ownership—Practice—Demurrer.*

Where by the rules of the Mutual Insurance Society of Brigus it was provided that "a *bona fide* change of ownership by legal transfer should be considered as cancelling the insurance from the time of such transfer, and that written notice of such change of ownership should be given to the secretary by the insured immediately on the same taking place.

*Held*—The notice was not a condition precedent to the release of members of the society from liability by reason of the transfer. The insurance is cancelled from the date of the transfer.

THE plaintiff in this case had been owner of a vessel called *Margaret Grant*, and the defendant of a vessel called the *Mary Jane*, and in the year 1867 these two vessels were insured in the "Mutual Insurance Society of Brigus" under its rules, by which, in case of the loss of any vessel the owners of all others were to bear reciprocally their proportions of such loss.

Whilst the rules of the society were in operation for that year the plaintiff's vessel was lost, and this action was taken to recover from the defendant his proportion thereof.

To the plaintiff's declaration the defendant pleaded that by the rules of the said "Mutual Insurance Society" it was provided that "a *bona fide* change of ownership by legal transfer should be considered as cancelling the insurance *from the time of such transfer*, the vessel being accountable for her proportion of all losses up to the time of such transfer, and of all losses at the seal fishery whether such losses occurred before the change of ownership or not." And the defendant averred that there was a *bona fide* change of ownership of the said *Mary Jane* by legal transfer before the loss of the said *Margaret Grant* and that her loss did not occur at the seal fishery.

To this plea the plaintiff replied that by the said rule it is provided immediately following the part before recited "that written notice of such change of ownership shall be given to the secretary by the insured immediately on the same taking place," and the plaintiff averred that no such, or any, notice was given by the defendant before the loss of the said *Margaret Grant*.

To this replication the defendant demurred, and the case was heard before us in the last sitting of this Court.

Mr. Whiteway, Q. C., for the defendant contended that by the rule in question (which was the 15th rule of the society) the

insurance was cancelled—and thereby defendant released from contribution towards the plaintiff's loss—from the time of such transfer; whilst Mr. Carter, Q. C., for the plaintiff contended that the written notice to the society of the change of ownership by the insured was a condition precedent and that the defendant would not be relieved from his obligation to contribute unless such notice had been given.

Having taken time to consider the arguments of counsel on both sides we arrive at the conclusion that although written notice of transfer is required to be given, this is only a stipulation, for the non-compliance with which, the party neglecting may be liable to the society if they sustained any damage thereby, but that it cannot be held to be a condition precedent to the release of the defendant from further liability by reason of his transfer of property.

In the investigation of this case we do not find a similar one in any of the authorities and we have to consider what was the intention of the parties to the rule in question by the wording of the rule itself—whether that intention was that the insurance should be cancelled from the time of the transfer or from the time of the notice thereof having been given—and as the rule expressly mentions *from the time of such transfer*, we are of opinion that the insurance was then absolutely cancelled and that the failure to give the notice could not in any way affect that which had then been completed.

If it had been the intention of the parties that the insurance should be cancelled only from the time of notice of transfer being given to the society, and not from the time of the transfer itself it would be so expressed, but as on the contrary it is expressed that it was to take effect *from the time of the transfer* we think that the notice was not intended to be a condition precedent and therefore that the demurrer has been sustained.

*Mr. Carter, Q. C., for plaintiff.*

*Mr. Whiteway, Q. C., for defendant.*

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1871, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Contract—Mistake—Rectification—Rule of Mutual Insurance Society—Practice—Injunction.*

The Court will not rectify an alleged mistake in a written contract unless it can be shown that there was an actual concluded agreement antecedent to the instrument desired to be rectified.

A bill filed for the rectification of a rule of the Brigus Mutual Society so as to make it conformable to what was alleged to be the real contract as evidenced by an understanding alleged to have existed before the rule was made and printed signed by the parties, was dismissed, (Hoyles, C. J., differing); the alleged understanding being treated by the Court as an element in the negotiations only and not as evidence of a contract antecedent to the making of the rules which constituted the policy of insurance or contract.

THE object of the bill in this suit is to have an alleged mistake in the rules of the Brigus Mutual Insurance Society corrected, so as to make them conform to the true intent and meaning of the parties to the rule, and in the meantime, to have the defendant restrained from taking advantage of the mistake, by proceeding at law to recover for an alleged loss, contrary to enquiry and good conscience.

For the latter purpose a conditional order for an injunction was had and argued, and of this we have now to dispose.

The circumstances under which the application is made and existed are these:

By the first rule of the Society, vessels sailing on a voyage to Cow Bay or certain other specified ports, after the 15th day of September, are not insured by the Society. The defendant's vessel did sail for Cow Bay after that date, and was totally lost shortly after her arrival there.

An action brought by the defendant against the complainant for his share of the amount insured, was defended by the Society on the ground that the right construction of the rule and its true meaning and intention as fully understood and agreed upon by all the members of the Society, were, that vessels sailing for Cow Bay after the 15th of September, were uninsured, *going to, staying at, and returning from* the excepted port; but the Court held, that whatever might have been the intention of the parties, the legal construction of the rule, and by this, they sitting as a court of law, must be governed, was, that such vessels were uninsured only *on the voyage to*, and they accordingly gave judgment for the plaintiff in the action, the present defendant.

This judgment as well as his claim against the other members of the Society, the defendant is about to enforce, unless restrained by the order of the court in this suit.

The rules for the year in question, 1870, were, as usual, adopted, and for the most part subscribed by the members of the Society, at their annual meeting at Brigus, in the month of February, but the defendant who resides in St. John's, and who was not present or represented at the meeting, did not become a member until the beginning of March, when in conformity with his usual practice (he having been a member of the Society in previous years), he directed Mr. Nathan Norman, who lives at Brigus, to sign the rules for him.

Norman was a member of the managing committee of the Society, and was himself, as were the defendant and the other members as is alleged, cognizant of and parties to the agreement and understanding above mentioned as to the intent and operation of the first rule.

The language of the first rule upon the point in question, has been the same for several years, but Cow Bay was first added to the list of excepted ports in 1870.

The defendant had not seen the rules for 1870 previously to sending directions to Norman to sign for him, and was not aware of this addition until after the loss, but copies of the rule had been sent to him in usual course.

The principle upon which the complainant relies, viz.: that a court of equity will restrain one party to an agreement from unfairly taking advantage to the prejudice of another party of a mistake in the agreement where the mistake was mutual, is undoubted, (*Story on Equity, 158, 162*) and assuming the main facts to be as stated, and assuming the alleged mistake to be as I at present regard it, one not of law but of fact occurring in the drafting of the rules, I am of opinion that the complainant is entitled to have this principle put in force for his protection in the present case, so as to prevent the defendant from recovering for a loss not fairly falling within his agreement.

When the defendant, by his agent, Norman, signed the rules, the agent agreeing to and understanding them in the same sense as did all the other members, the defendant became a member of the society on exactly the same terms and conditions, entitled to the same privileges and advantages, and subject consequently to the same liabilities, legal and equitable, as Norman himself, and as every other member of the Society was. The agreement was not one for defendant and another,

d a different one for Norman, but one and the same for all the members. This agreement was, that vessels after the 13th September should be uninsured *at* as well as *going* to Cow Bay. True the rules mistakenly provided that they should be uninsured *going to* only, but this mistake would affect the remedy merely and not the agreement itself. The rules would, if they did, govern the parties in a court of law, but the agreement would govern them in equity.

In making this agreement Norman was clearly acting within the scope of his authority. It is not disputed that the defendant was bound as well in law as in equity by the insertion of Cow Bay in the rules for 1870, though without his knowledge, or that if the words *at* Cow Bay had also been so introduced, he would have been equally bound. So for the same reason (his liability for the act of his authorized agent) would he be bound in equity by the agent's agreement to that effect, notwithstanding that the agreement might not have been correctly reduced to writing.

Norman was authorised, not merely to execute a certain document, seen and approved beforehand by his principal, (for the defendant had not seen the rules for 1870 before directing Norman to sign them) but to constitute his principal upon the like footing with all others, party to an agreement, the terms of which varied from year to year, and of the conditions of which the defendant was content to take his chance; and although the defendant was acquainted with the rules for former years, yet these also were as appears signed by Norman for him, and inferentially therefore, upon the same understanding as those of 1870. Suppose that without defendant's knowledge, some stipulation in his favor agreed to by Norman had been by mistake omitted from the rules, will it be denied that defendant could have the mistake corrected; and if entitled to avail himself of Norman's contract when in his favor, he must surely consent to be governed by it when to his disadvantage.

The question before us is not as it seems to me, whether the defendant is to be affected by notice to his agent of a previously existing fact, the knowledge of which by the defendant himself would affect his conscience and thus subject him to equitable control, as in the case of an agent of the purchaser of a legal estate having notice of a prior equitable incumbrance, it is one simply of contract and agency—did Norman, acting within the scope of his authority, agree on behalf of defendant to exclude Cow Bay from insurance as well as the voyage to Cow Bay,

and do the bill and affidavits establish *prima facie* such contract and agency, not so as to sustain a final decree, a very different matter, but so as to require the court temporarily to suspend proceedings at law, in order to afford the complainant an opportunity of proving his right to the relief he seeks, and in my opinion, taking into account the fact that for this application the complainant has had to rely upon voluntary affidavits, this question should be answered in the affirmative.

It would of course be open to the defendant to shew that he had been misled by the wording of the rules, or that the alleged agreement had not been made by all the member of the Society, but these circumstances would be matters of defence, and they do not appear upon the defendant's affidavits.

The demurrer for want of parties cannot, I think, be sustained, as the other members of the Society, having a common interest with the complainant in the only object of this suit, the resisting the defendant's claim for insurance, it is sufficient that the complainant sues for them as well as for himself.

Upon the whole case I am of opinion that the order should be made absolute for all future suits; but looking at the time of making this application, and the nature of the defence in the action at law, and the small amount involved in the action, the judgment there recovered ought to be paid.

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HON. MR. JUSTICE ROBINSON :

I do not think the plaintiff is entitled, upon any grounds to succeed in his present motion; the object of it is to tie up by an injunction, a judgment at law obtained against him by the defendant, until a rule of the Brigus Insurance Club should be reformed and made conformable with an understanding that is said to have existed before the rules were made and printed, to the effect that the club were not to be liable for a loss at Cow Bay, where the defendant's ship was wrecked in October, 1870.

In *McKenzie v. Coulson*, L. R. 8 *eq*, that suit was instituted to reform a policy of insurance, and make it conformable with a written slip. The Vice-Chancellor of England there ruled "that it is always necessary for the plaintiff to shew that there was an actual concluded contract, antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument." In the present case there does not appear to have been any antecedent or other contract than the rules which the defendant signed, and which

constitute the policy; and as regards even the understanding which the plaintiff alleged, I am by no means satisfied by the evidence adduced that any such ever did clearly exist; the only evidence we have of its existence is the opinion of the secretary, and against his opinion we have his actions; the language now alleged to be a mistake has been used by the Brigus club year after year for many years, each new club has adopted and re-adopted the same rule, using the same words, and never until now pretending that those words did not accurately express their meaning; even in the action at law just determined they pleaded this rule as a true exponent of the agreement of all parties, and it was only when the club discovered that their rule was insufficient for their protection, that they declared they had made a mistake; the assured made no mistake, he signed the contract submitted to him by the club, and they now seek to be relieved of their responsibility by a decree of a Court of Equity, which would have the effect of an *ex post facto* law, to the irreparable prejudice of an innocent party.

It is possible that the club may have been careless in the consideration, and in the phraseology of their rules, but they must bear the consequence of such carelessness, for I fear that if they could get the relief they now seek, forethought and caution would be lessened, confidence in the integrity of solemn contracts would be imperilled, and grave mischief would be the result.

The case would be this—a man insures his vessel, obtains his policy, incurs a loss, recovers a judgment, and when he demands payment his underwriters say—"true you have sustained a loss within your policy, and you have conformed to your agreement. but we made a mistake we may have misled you thereby, still, we will avail ourselves of our own wrong and will not pay you your insurance, we will apply to a Court of Equity to reform your policy," where a mutual pre-existing contract had been established by indisputable evidence, and one party unconscionably sought to avail himself of an error which he knew to exist, relief might be afforded, but that is not this case; the defendant is not shewn to have been cognizant of any other contract than the rules which he signed in March, 1870. It is not even alleged that he had any part in making them in Feb, 1870, or was ever present at the consideration of them, the plaintiff's position is, that Mr. Norinan, of Brigus, had been one of the committee engaged in framing the rules in February, and that after those rules had been adopted, printed, and pub-

lished, the defendant, of St. John's, in March following, wished to be insured in the club, had authorized Mr. Norman to be his attorney (under the 2nd rule) for the sole purpose of affixing his, defendant's, hand and seal to the adopted rules, and that he, defendant, must be presumed to have had constructively all the information upon pre-existing matters in relation to the club that Norman possessed; now such a position would carry the doctrine of constructive notice beyond precedent or principle.

No doubt notice to an attorney will, under certain circumstances affect a principal, but such notice must be in the *same transaction*, for if the agent was employed by another person in the same matter. or in another business, or at another time which he may have forgotten, it would be unjust to charge his present principal on account of such defect of memory. *1 Story, E. J. 327, Lawther v. Carlton, 2 Atk. 242; Worsley v. Carbons, 3 Atk. 392*; it is very difficult to say that a principal can be constructively notified through his attorney, of anything except what his attorney has acquired *after retainer* and during employment. *2 Hare 402, Sugden V. & P. 1044*; and the doctrine of constructive notice is one which a court is always tender of extending, because it is obviously liable to abuse. *Warrick vs. Warrick, 3 Atk.*

The language of Vice-Chancellor James, in the authority I first cited seems appropriate to the present case, "If all the plaintiffs can say is, 'We have been careless, whereas the defendant has not been careless,' it is useless for them to apply to a Court of Equity."

We have had under our consideration during the last Term, in another matter, these Brigus Club rules, and then I desired to uphold them in their integrity and plain meaning for the protection of the underwriters, as I would now uphold them in like manner for the protection of the insured.

In my opinion the injunction here prayed for should be refused and the rule *nisi* be discharged.

It will, of course, be observed that the present decision rests entirely upon the facts at present before the Court.

Mr. Justice Hayward concurs in the foregoing judgment of Mr. Justice Robinson.

*Mr. Carter, Q. C., for plaintiff.*

*Mr. Pinsent, Q. C., for defendant.*

1871, July. HON. SIR H. HOYLES, C. J.

*Grand Jury—Preferring second indictment for same offence against same party same term—Omitting to examine witnesses—Number necessary to ignore bill.*

Where a Grand Jury has ignored a bill the Court will not permit a second bill of a like nature to be presented to them at the same term.

IN this case Mr. Pinsent, Q. C., with whom was Mr. Carter, C., moved for leave to prefer a second indictment, a former one against the defendant for the same offence, sent to the grand jury on the first day of the term, having been ignored.

The grounds upon which the application was made were:—1st.—That the grand jury had omitted to examine three out of the four witnesses whose names were on the back of the indictment; 2nd.—That upon the jury coming into court and stating that they could not agree, they were told by the court that unless twelve of their number agreed to find “a true bill” they had no alternative but to ignore it; whereas, as Mr. Pinsent contended, they should have been told that twelve must agree to ignore the bill, and that if twelve could not agree either way they should keep the bill before them until further evidence or the attendance of other jurors should turn the scale for or against it.

For this position no authority was cited except an ambiguous sentence in *Archbold, C. P. & Cr.*, the true meaning of which appears on the next page of the same book, and is in accordance with the rule laid down in *Hale, Blackstone, Stens*, and many other books of undoubted authority, that a majority of the grand jury, consisting of twelve at the least, must concur in finding a bill.

But, if this be the rule, and if twelve do not so concur, that being wanting (the concurrence of twelve), which is essential to “a true bill,” the necessary result is that no bill is found, and the ignoring of the bill is then merely the formal announcement of this result to the court.

We know of no rule or precedent requiring the court to direct the jury, in case of twelve being unable to agree, to send for other jurors or seek further evidence, and a little reflection will suggest objections apparently insuperable to either course. On the contrary, it is expressly laid down in *Deacon's C. Law*, p. 663, that if twelve do not agree to find “a true bill” they must ignore it, in these words:—“But if the majority think there is not sufficient evidence, or if the majority consisting of

*a number less than twelve should even think there is, then the words 'No True Bill' are endorsed."*

Thus it appears that the rule laid down by the court, and upon which the jury acted, was correct, and that there was, therefore, no misdirection, even if a misdirection would be a sufficient reason for acceding to this application, for which position there is no authority.

With respect to the omission to examine the three witnesses, we are bound to assume, in the absence of proof to the contrary, that, sensible of the obligation of their oaths and of the responsibility resting upon them by reason of their important and honourable functions and large powers, the Grand Jury gave to the case before them, as they believed, a full investigation and a becoming and impartial consideration.

Now, how do the facts stand as they appear by the affidavits of the prosecution and the report to us of the officer of the court.

The Grand Jury did not examine *viva voce* the three witnesses named, viz., the prosecutor and Messrs. Hayward and Withers, but by an irregularity inadvertent and accidental, as far as we can learn but not the less favorable to the prosecution and unfair to the defendant, who might justly have complained on this account if a true bill had been found against him upon such evidence, they had before them the apparently carefully drawn deposition of the prosecution on which the bill was founded. With this deposition they had, properly, the official certificate and affidavit of the defendant being the publisher of the *Telegraph*, verified by affidavit of the witness, Hayward, and the several copies of the *Telegraph* annexed to the prosecutor's deposition and referred to in the Chief Justice's charge.

So far, therefore, the jury had before them, though in an irregular way, the evidence of two of the witnesses who were not examined. What the witness, Withers, was prepared to prove, we are unable to say, as his deposition does not appear to have been taken, and his name was endorsed on the indictment after it had left the hands of the court.

Now, although as a general rule a Grand Jury ought undoubtedly to receive all legal evidence tendered to them, yet, looking at the circumstances above stated, and remembering that it is competent to a Grand Jury to find a bill or prefer a presentment on their own knowledge,—*Reg & Russell, C. & M., Arch. 67*, that it would not be unreasonable in them to dispense

further evidence as to a point on which they are already decided; that we do not know and ought not to hear the facts upon which this Grand Jury differed; that the omission complained of was the act of the whole jury, as well of those who were for as of those who were against the bill, and the present is an *ex parte* proceeding, in which the jury, if heard, we are unable to form and do not express any opinion as to the necessity or propriety of their examining witnesses, or as to whether there has or has not been any denial of justice in this matter. But assuming that we formed such opinion, and that it had been with the prosecutor, the purely legal question remains whether a second indictment can be preferred during the present term; and upon this point, after referring to the numerous authorities cited by learned counsel for the prosecutor, and to all others which were available to us, we have unanimously arrived at the conclusion

that, although there is one case (*R. vs. Newton*, 2 M. & W. 101) which justifies this application, the true rule is that laid down by Mr. Justice Patterson in *R. vs. Humphreys, E. & M.*, affirmed by *R. vs. Austin*, 4 Cox, C. C. 386, and cited with approval in *Roscoe*, p. 178, and *Stephens, Com.*, 3rd edition, vol. 4, p. 141, *et acquit*, and other text books, and wherein that learned judge states his opinion: "If the Grand Jury have ignored the law, they cannot find another bill against the same person for the same offence at the same sessions. It is laid down in the usual practice that it cannot be done, though I know of no case on the subject, and I think it would lead to great inconvenience if it could be done." We have been pressed with the importance of this case and of the hardship on the prosecutor being obliged, if this application be refused, to postpone his proceedings to next term; but whatever the hardships on one side or on the other, the law once decided must be applied alike to all cases, and particularly we must be careful not to depart from it where by so doing we should establish a precedent, which, whatever there might be to commend it in any particular case, would be obviously wrong in principle and mischievous probably in its practical operation.

The application must be refused.

*Mr. Q. C.*, and *Mr. Pinsent, Q. C.*, for the prosecutor.

414 MCCARTHY, ADMR. OF ELIZA RACHEL MCCARTHY,  
v. RACHEL GREEN, ADMR. OF DANIEL GREEN.

1871, *July*. HON. SIR H. HOYLES, C. J.

*Infant, Estate of—Voluntary maintenance of infant—Right of guardian to appropriate cost of infant's maintenance from infant's estate.*

When the father of a child impliedly concurred in the appropriation of the interest of the child's funds to her maintenance, he himself benefitting by this appropriation in being relieved of the burden of her support, the Court refused to permit such money to be recovered back as money misappropriated.

THE bill in this case is filed for an account of the estate of the said Daniel Green, and for payment to complainant of the share thereof to which the deceased, Eliza Rachel McCarthy, daughter of the complainant, was entitled in right of her deceased mother, who was a daughter of the said Daniel Green.

The defence is that such share was, with the consent and approval of complainant, applied to and expended in the maintenance, education and burial of the said Eliza Rachel McCarthy, by the defendant, and that any interest the complainant had therein was assigned by him to the defendant.

The main facts of the case are as follows:—

The defendant is the widow of the late Daniel Green of Harbor Grace, and the deceased, Eliza Rachel, was their grand-daughter.

In 1850 the grand-daughter was taken by her mother to Green's house, and her mother dying there shortly after, the grand-daughter (then only a few months old), was, with her father's (the complainant) assent adopted, maintained and educated by her grand-mother, until the decease of the grand-daughter in 1859 at the age of twenty years.

The said Daniel Green died intestate at Harbor Grace in 1852, possessed of considerable property, and the share of his estate to which the said Eliza Rachel was entitled, was about five hundred pounds.

This sum was invested by the defendant, and the interest drawn and applied by her to the maintenance and education of her grand-daughter.

The records of the Supreme Court shew that applications were made to it for permission to apply the grand-daughter's estate to the expenses of her maintenance, but it does not appear that such applications were acceded to.

Shortly after his child went to her grand-mother's, the complainant, at the instance of the defendant, signed some document, the character and contents of which are in controversy; the

complainant alleging that it was merely a consent on his part to the defendant being appointed by the Supreme Court guardian of the child, the defendant asserting that it was a deed by which the complainant, in consideration of the defendant agreeing to maintain and educate her, assigned all claim and interest in his daughter's property to the defendant.

The document has not been produced by the defendant in whose possession it was left, but she seeks to prove its contents by parol evidence, the reception of which is opposed to by the complainant.

After considering the evidence offered to excuse its non-production, we are of opinion that parol evidence of its contents cannot be received, as it is shewn by the defendant's own witness to have been deposited with her, and she does not appear to have made any search for it, or in any way to account satisfactorily for its absence; but we are also of opinion, that such evidence, if received, would shew, not a grant of the complainant's contingent interest in his daughter's property after her death, an event which does not appear to have been then in contemplation, but merely his assent to the property being applied to his daughter's support, an object for which the annual interest would be reasonably sufficient.

Under these circumstances the claim of the complainant must be disposed of as if no such document had existed, and in such case, the complainant would stand in his daughter's place, and be entitled to her equities, except in so far as he might by his own conduct have waived or varied them.

Had his daughter survived and had she been the complainant in this suit, she would have been entitled to her share of her grand-father's estate and interest, without being subject to any deduction for maintenance, since the defendant, by voluntarily placing herself *in loco parentis*, would be subject as regards the child to a parent's responsibilities, so far as being obliged out of her own means if sufficient for the purpose to support the child, and it was not in the power of the complainant to shift this burden upon his child's estate, at least without the sanction of the Supreme Court.

But although his daughter could have maintained this claim to its full extent, we think the complainant is not so entitled, because under the evidence we are of opinion that the complainant impliedly concurred in the appropriation of the interest of his daughter's money to her maintenance, and because he himself benefitted by this appropriation in being relieved from

the burden of her support, or from the task which he professes himself to have been very unwilling to undertake, of fixing that burthen upon the defendant; and it would be inequitable and unjust to permit him to recover back money as misappropriated where he himself had been a party to and had profited by such misappropriation

His claim must therefore be limited to the principal of his daughter's estate, five hundred and eighteen pounds ten shillings and four pence. For this amount with costs let a decree pass for the complainant.

*Mr. Emerson* for complainant.

*Mr. Carter, Q. C.*, and the *Attorney General* for defendant.

## QUEEN v. KENNY.

1872, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Criminal law—Practice—Indictment—Arson—Proof of incorporation of company laid in indictment—Surplusage*

Where the evidence showed that the policy of insurance was not a contract under the common seal of the company, but the Crown, having been permitted without objection to give secondary evidence of the contents of the same,—

*Held*—The time for objection was when secondary evidence of the contents of the instrument was tendered, the Crown having been permitted to give this evidence the prisoner was precluded from taking advantage thereof.

Where the indictment set forth an intent to defraud the Phoenix Fire Insurance Company the Court held the incorporation of the company was implied, and need not be proven; the ordinary facts proven at the trial established a *prima facie* case of incorporation.

THE *Attorney General* addressed the jury to the following effect:—

They had heard the charge as laid in the indictment against the prisoner at the bar was that of arson. That the prisoner, John Kenny, did, on the 10th October last, wilfully and feloniously set fire to his house, with the intention of defrauding the Phoenix Assurance Co., of London. The Crown, in the interest of the public, finds it its duty to bring the matter before this tribunal, so that the prisoner at the bar, if he be not guilty, may have the opportunity of proving his innocence and vindicating his character, and of showing to the public that he is

not one of those who, by setting fire to his property, would endanger the lives and property of his fellow citizens for the sole object of robbing the company of the insurance effected on his property. The facts of the case would be deposed to by witnesses—men of indubitable character—upon whose words they could place implicit confidence, and who, further, beyond that desire which should actuate all good citizens in bringing the guilty to justice, had no personal interest to subserve. Unfortunately in the present, as in most cases of the kind, the evidence on the part of the Crown was of that peculiar kind known as presumptive or *circumstantial* evidence—that is, where some facts are proved others follow as natural and probable conclusions from them, and the Crown on this occasion is in such a position; the facts and circumstances must lead your minds to the only conclusion intelligent and reasonable men can arrive at. When the perpetration of a crime of this heinous character is contemplated the utmost secrecy is preserved by the criminal in all his words, acts, plans and deeds; he selects his time the dead of the night, when all around him are at rest and seeming security; then the incendiary, feeling secure from observation, proceeds to the accomplishment of his crime, feeling assured of success because unseen by human eye. But justice is on his track and every mark, sign and circumstance connected with his crime are collected and at last are presented in light as strong as evidence of the most positive character could place them.

It appears that Kenny, the prisoner at the bar, occupied a house in the vicinity of Fort William in this town, in which he had a leasehold interest. This house had been insured by the prisoner in the office of the Phoenix Fire Assurance Co. of London, of which George T. Rendell, Esq., is agent in this colony, at an annual insurance for the house of £150 cy, and for the furniture of £50. He had a policy from this company for many years, had regularly paid his premium, and had generally, he (the Attorney General) believed, to the time of the late unfortunate occurrence, enjoyed an unimpeachable character. On the morning of the 10th of October last a man named Moore, residing on the Signal Hill road, saw a fire breaking forth from a house in the neighborhood of Fort William. The fire had been blazing about twenty minutes before any alarm was given, and, upon coming down, the man Moore saw that it was the prisoner's house, and, on opening the shop door thereof, saw the prisoner, Kenny, and his wife fully dressed in the

shop; Moore alarmed the next-door neighbours; the police and the brigades were next upon the scene, and the fire, which proved to be in the prisoner's house, was eventually extinguished. After the extinction of the fire, Mr. Boggan, Superintendent of the Phoenix Fire Brigade, with others of the brigade, and Sergeants McCowen and Sullivan, visited the premises, and discovered several distinct and separate fires in different parts of the house. [Here the learned gentleman referred to the different parts of the house, viz., attic, cock-loft, front room, bed room, and work shop on the basement, in which it was alleged the fires had been discovered by Mr. Boggan, &c., &c., and continued]: when to those facts was added the finding of the brush saturated with kerosene oil, &c., he would ask was it reasonable to suppose that under the circumstances mentioned the fire could be said to have been the result of accident. Then again, when the prisoner was questioned concerning the origin of the fire, did he advance any reasonable excuse? On being asked at the scene of the fire, and when it was extinguished, how it had originated, he informed Sergeant McCowen, in presence of Constable Lahey, that he did not know as he was not in the house at the time, and, within twenty minutes on again being questioned, he answered that he did not know how it originated, and that he was nearly burnt in his bed. These were most unreasonable, contradictory, and evidently untruthful excuses. If the fire had been successful and the house completely destroyed, all proof would have been obliterated; but, fortunately for the ends of justice, by the zeal and energy of our firemen the fire was stayed in its progress, and sufficient has been disclosed to bring the perpetrator to justice, and in all probability an example will be made sufficient to deter the evil-minded from any attempt at a repetition of a crime, which in its commission may not only wreck and ruin the property, but sacrifice the lives of a whole neighborhood.

He would have another opportunity of addressing them and would say nothing further at present which might be calculated to prejudice the prisoner or to prejudice his case, but on a full hearing of the evidence, which would be adduced by the Crown, he was assured the jury would feel satisfied that the prisoner has been justly charged, as in the indictment, of having unlawfully and maliciously committed the offence with the intent to defraud as alleged.

Fraucis Boggan, being called and sworn, was examined by the Attorney General, and deposed as follows:—

Am first director of the Phoenix Company; know the prisoner Kenny—his house is situate nearly opposite the Ordinance yard: remember a fire occuring there this fall—was present at the fire; think it was on the night of 9th or morning of the 10th of October; think it was about between twelve and one o'clock; was there with Phoenix Company; when I arrived the fire was breaking out of an upper gable-end window; think there are two windows in the gable end; house has on the street floor shop in the front and a room in the back, which I think was a kitchen; next floor upstairs there are two bed rooms over the shop in front, and a large room in the rear facing the southward; went to work when I got there to put out the fire, which was done in a short time: did not enter the house at first, but went there after; after going home with the Company returned in company with two other members—William Harris and Philip Quirk; when we went back to the house there were four police there—two sergeants and two men; brought a torch-light from the engine-house, with which we went up stairs—the prisoner was not there then; first room entered was that over the kitchen; discovered two fires at the south-east side of the room—they were then burned down; the remains were as of shavings—they were at each end of a table which stood between the windows; we discovered the remains of another fire at the end of the room, distant about eight feet from the others; the last-mentioned had burned bottom and another portion of the sofa; the two others were about four feet apart, and had burned a portion of the partition and floor, but not to any great extent; there were shavings strewed over the floor and the remains of the fires were like those of shavings, moistened by water; went into the front rooms from the back, there were two bed-rooms over the shop fronting the street; saw bedsteads in north-east room over the shop and the remains of a fire adjoining the partition, which had burned the floor through to the shop; it had the appearance of being recently extinguished; next went to the attic, which ran the whole length of the house; saw four or five bedsteads with shaving beds; do not recollect seeing any covering on any bed but one, which appeared to be old wrapping; those beds were in bedsteads—did not see any blankets; the two in the north-east end appeared to have been set on fire; one was on the northern side of that end, the other on the

southern; there were marks of fire on both; one appeared burned on top, the other underneath; they were about eleven feet apart; there was then no smoke on the attic, and the fires had the appearance of being recently extinguished—the marks of water was on the floor, it had drained away; the cock-loft had been cut away; the boards which had formed the floor of that loft were burned on the side next the roof, and the roof was scorched; do not recollect whether there was a window opening on the gable end of the attic; next descended to the basement under the kitchen, in the rear of the shop; it appeared as if used as a carpenter's shop, contained a carpenter's bench, a box of tools, and some tools hanging about; did not remark any shavings about the attic floor—do not think there were any on the bed-room floors; saw a whitewash brush in south-east room—there was no smell of whitewash from it—could not see anything on it; the smell was as if it was saturated with turpentine and kerosene oil; all the fires in the house were separate and distinct; consider that it was from the fires in the attic that the cock-loft and roof had taken when caught; the flames had not broken out when we arrived; saw a black bottle on a table in the room over the kitchen—it was about half full—smell as of turpentine.

Cross-examined by Mr. Pinsent: Am not aware that Phoenix Fire Brigade is connected with Phoenix Fire Assurance Company—it is not under the patronage of that company; am not qualifying for constabulary; consider it my duty at certain times to go back to the scene of fires; went back partly with the intention of seeing if it was likely that fire might again break out, and partly to see if the fire had been wilful or accidental; two others went with me—did not take them; on going back with the brigade left no fire after us; went back by reason of some information I received; was not in the house before going the second time; the bell at the engine-house was first rang by some person of the neighbourhood; when we arrived fire had not broken out; on coming down second time brought a torchlight from engine-house for inspection of premises; there was a smell of kerosene and turpentine about the house; the kerosene and turpentine were found on table with the brush; would not think it anything extraordinary that smell should exist where those things were found; by the fires being separate and distinct, mean that there was no visible connection between them; could not swear that the fires did not originate in one part of the house; knew prisoner for a

long time—always knew him to be a respectable tradesman, he bore a good character; am not aware of any jealousy on account of position conferred on his relative; know prisoner's son-in-law, named Rowe, have no ill-feelings against him through competition; never worked in company with prisoner; by shavings being strewn on floor, mean scattered about floor; think there were both kerosene oil and turpentine on the brush from the smell; upon coming back second time found cock-loft torn down—the boards were on the floor; believe fire entered cock-loft from attic—boards were charred on upper side; although no appearance of fire on the other side, thinks fire found its way up from draught at the end, as fire sometimes travels in an extraordinary manner; the attic stairs goes down close to the room in which the sofa was; it is a narrow stairs—do not know whether it had a door; do not know whether the partition bulged out; do not know whether the partition was burned on the outside; did not observe anything particular in the basement being used as a carpenter's shop.

Re-examined: Whatever feeling might exist in regard to other family connections did not affect the old man; the partition was burned on the inside—did not see any mark on the outside; the back-room door opened against the sofa; saw no fire on the stairs; believe the fire got on the cock-loft from the gable-end of the attic—the fire on the cock-loft had not burned through; when I first went there the fire was in the attic and middle floor; in going the second time I wished to see where the house was set on fire; do not remember seeing prisoner at the fire; time from departure of the company from the fire to our return was about three-quarters of an hour, the house in the meantime was in charge of the police.

By the Court: It is my opinion that the fire ascended from the attic to the cock-loft by the gable-end; saw the whitewash brush on the table in the centre of the floor of the south-room—saw the bottle with turpentine on the table; do not think it usual for carpenters to use turpentine with such a brush; did not try to discover the smell of turpentine or kerosene oil on any of the woodwork—did not look for any; the bed in one of the front rooms felt like feathers; the head of the bedstead in the north-east of attic, in which the fire was, stood against the gable.

George T. Rendell, Esq., being called and sworn, was examined by Mr. Whiteway and deposed as follows:—

Am agent in this colony of the Phoenix Fire Assurance Co., of London; have known the prisoner for several years—cannot say how long; know the situation of his house in the east end of the city; it is built of brick with a wooden frame; the roof originally covered with shingles, subsequently covered with sheet iron; besides the street floor it has a storey underneath—one over that on a level with the street and next the attic floor; was there the day of the fire—it was subsequently to the fire; the police were then in charge of the house; saw when I went there some articles of furniture lying about in confusion on the street floor, as would be the case after a fire—they were articles of common furniture; on the next or upper floor there were also a few articles—in each of the rooms in the front there were a bedstead and a bed, which I believed to be of feathers; in the next or back room there were the remains of three distinct and separate fires—this was about two o'clock in the day; the fires might have been about three or more feet apart—could not say exactly; one was near the remains of an old sofa, which was partially burnt—the other against the southern walls, near the windows; there was very little furniture in this room; there were the remains of another fire in the north-eastern front room. and shavings scattered about the floor; every part was wet; there was a whitewash brush and saucer upon the table; there was something in the saucer—did not examine it—the brush appeared to be saturated with kerosene oil; a partition separated the other front room from that on the north-east; the skirting board and portion of the floor were partially burned in each room; next went to the attic, which extends the whole length of the house; there were in that portion of the house five bedsteads; attic stairs came up about the eastern end and landed about the centre; two of those bedsteads were upon the north-east side, two on the south-east—the other more to westward; the bedsteads in the most eastern extremity of the northern and southern sides had bedsacks, and were partially burned to the bottom boards; should say those bedsteads were about six feet apart—floor underneath bedsteads was not burned, but the roof over each was burned—each side was blackened; there had been another loft over the attic—the boards had been taken down when I saw them; there had been fire on those boards, upon the upper side—one side had formed the ceiling of the attic, the other the floor of the upper loft; a portion of the attic had been ceiled and a portion not; do not think the fire

the cock-loft was communicated from the attic—would have been possible if there had been space between the boards; the boards of the roof were blackened—more on the southern than on the northern side; the fire on the cock-loft must have been fierce, as the roof boards were much burned; the prisoner testified to me to have his house insured about four or five years ago; policy was issued, forwarded and delivered in some way to the prisoner (Kenny); the first policy insured the house in which the fire occurred in the name of the prisoner (John Kenny) for one year for £150 cy; the policy was renewed from year to year, the premium regularly paid, and receipts were given in his name; recollects that the last given was to the prisoner on the 16th March, 1872, for the year ending March, 1873, insuring in a special manner prisoner's interest on the premises; there was another policy also issued upon furniture, which became due upon that day—this was also renewed from March 16th, 1872; these policies were in force at the time of the fire. [Question as to number of years of prisoner's lease-interest objected to by Mr. Pinsent]. That was interesting; subsequently visited the house—visited it two or three days after the fire; went into the basement, under street; this floor had been used principally as kitchen and work-shop; saw the remains of another fire close to stairs leading to kitchen near partition; the fire had only consumed a part of the partition and floor—there were some burnt shavings there; this fire had no connection with the fires discovered that day; the strongest fire in the house appeared to be in the cock-loft.

Ex-  
amined by Mr. Pinsent: Was not aware first day of the fire on that any furniture had been removed; was not present at the fire, but it does not follow that any furniture had been removed in the case referred to, nor was it likely; south of the main, on first floor upstairs, was a sitting room; was not aware that shavings were lying about; smelt kerosene oil on the brush—do not profess to be an authority in such matters, but was of opinion that it was kerosene oil; saw no kerosene oil about—did not go for the purpose of making a general inspection; cannot say for what purpose the brush was used—found it on the table; did not smell the brush or look into it—saw it on the table—very little in it—did not say what was in it; saw on the attic a number of beds—bedsteads—beds appeared to be of shavings; saw red spots of fires on the attic; the fire that broke out must have

been from the cock-loft, as it broke from the roof; do not believe the fire in the cock-loft originated in the attic; believes it was impossible that fires in the bedsteads could have taken from the cock-loft; would not swear that the fire in the cock-loft was communicated from bedsteads in the attic—believes it quite improbable; fire is very erratic; stairs from the attic comes near the door of the southern room in the eastern end of the house; observed partition near the sofa—did not observe that partition had been burned, as I did not look particularly; observed that the shavings near carpenter's bench in basement had been ignited; the room had been used as kitchen and workshop; what I mean by separate and distinct fires is, that there was no visible connection between them; saw the house on the first day a few hours after the fire; know there was a cock-loft—saw the boards on next floor; the fire on the cock-loft could not have been there if there had not been a floor; saw very little furniture—was not aware that any furniture had been taken into Mrs. Leo's house or into Kough's; do not recollect seeing a hole cut in the floor between the attic and back room—did not attract my attention.

Re-examined: It is not unusual to see shavings in a carpenter's shop, but not usual to see them in different parts of the house; when I was there there was a hole in the roof, through which the fire had burnt; I suppose that must have been the hole through which the fire came that gave the alarm; there could not have been any connection between the fires in different parts of the house, it would have been, in my opinion, impossible.

By the Court: Stairs goes up from the south-east corner of the house, behind the shop, and lands about the middle of the house; attic stairs more like step-ladder than stairs; any person coming down stairs would have the room door on his right hand—going up his back would be to the southward; the front rooms are entered from the back rooms; the foot of the attic stairs comes very near the back-room door; in saying it was not likely that furniture had been removed, meant that it had been in charge of the police.

John R. McCowen, being called and sworn, was examined by the Attorney General, and deposed as follows:

Am Acting Sergeant of the St. John's Police force. Was in charge of night patrol on the night of the 9th and morning of the 10th of October last. When passing Cochrane street saw fire glare up two or three times out of prisoner's house. Imme-

diately sent Constable Keough to ring the fire-bell, and Constable Lucey to acquaint the Water director, of the occurrence, and to arouse the Police at Fort Townsend. Constable Lahey and I immediately ran to the scene of the fire. When arrived I caught hold of the latch of the door—found the door fastened inside—knocked at it and shouted fire, fire. Heard a female voice answer, 'I right. Went to the adjoining house—Keough's, and knocked with my stick, and was replied to from inside. Returned to Kenney's door which was opened by Mrs. Kenny. Asked her presence of Constable Lahey how the fire originated. She said she left the candle lighting on the lobby, awaiting the return of her husband and fell asleep. He came in about a minute later. Asked prisoner how the fire took place—said he was gone to town at a friend's house. Mentioned the name, but do not recollect it, and said that when he returned, his house was on fire. Constable Lahey was present at the time of conversation, and neighbors began to assemble. First thing done was to close the front windows—they were open, and I had them closed. They then commenced removing the furniture—old tables, chairs, washing stands, &c. I placed Constable Lahey in charge of them, and told him not to allow, even the prisoner, or his wife to remove any of them. They were subsequently removed to the house—as it rained, and I was afraid that they might be injured. I gave permission to have them removed—prisoner was there then. I saw Mrs. Kenny again, and asked her how the fire originated. Prisoner was there at that time—only about a few yards off. She said she went upstairs about prisoner's bed, and forgot the candle. In a few minutes after the prisoner, and he said, he was in bed when it occurred and the bed to be burned. It was about twenty minutes to one, when he said he was at a friend's house when it occurred—about twenty minutes after one the latter conversation took place. I asked him in the latter conversation, if his house was insured—he made no answer. I asked him again, and he said no. I asked him if it was insured for £10 or £20, and he replied that £50 would not compensate him for the loss of his goods. When I first asked him if his house was insured, he made no answer, but muttered something and walked off, leaving me away from me altogether. I asked him on both occasions how the fire originated; on the second occasion he said he was in bed and had like to be burned. The fire was extinguished by about twenty-five minutes past one, and I placed Constables in charge of two of the police. The water had

ceased playing about at that time. Before going to the house, from Cochrane street, did not hear any alarm of fire. There was no alarm given before we gave it—we were the first that gave it. Closed the house after the fire was extinguished; after seeing the furniture inside, took the key and gave it in charge to one of the men. Subsequently, after the fire was extinguished, and the fire brigades gone away, entered the house and made an examination of the premises. Saw Mr. Boggan, Sergeant Sullivan, and others there—went from the kitchen to the second floor and then to the attic. There had been a fire in the south-east corner, and the roof had been burned. Did not see any cock-loft—there were boards on the floor, which had been taken down. After fire brigades had gone, I sent two of the police to the police office for a lantern and candles—two members of the Phoenix Fire Brigade arrived, and they, with Sergeant Sullivan and I, examined the house. We went up to the back room, which had been used as a sitting room. We saw there the appearance of two fires—chips and shavings about—the sofa was burned, and the boards underneath it were burned. Only swear to two fires in that room. Proceeded to another room on the same floor—on entering, saw holes where the floor and partition had been burned for some distance; that was a bed room. We now proceeded to the attic—examined where we had seen the flames emanating from. The boards were burned. There were a lot of shavings and chips on the attic. There were bedsteads on the attic, only remarked two. On one there was an old sacking—on the other saw nothing, it was charred or burned. The sacking was somewhat burned. Saw some boards lying on the floor—one side burned and the other quite clean. There had been two distinct fires on the attic—could not say how far asunder—did not measure. Saw five distinct fires in the house in three apartments. Came then off the attic, and found below the bottles, saucer, &c., produced. Identify the articles as marked. Believed contents of bottle to have been kerosene oil and water or turpentine. Next looked to see if there was any wearing apparel or good furniture about—could see none. The roof about the cock-loft was very much burned—the fire must have raged more there than in any other part. Did not subsequently go further than the kitchen before my previous examination.

Cross-examined by Mr. Pinsent: There were two or three children there before me—thought it extraordinary; did not know whose children they were—they were coming from Mag-

etty Cove; knocked at the door of prisoner's house—it was then opened; did not see Moore there—could not swear he had not been there before; the door was not opened when I knocked—a female voice answered all right, and something else; knocked at Kough's door also, and was answered; there is no window up when I got there first—when windows were closed made them be put down; am sergeant of Constabulary was nine years in the Irish Constabulary; am not at present so anxious about prospects of promotion; Mrs. Kenny said the fire was caused by leaving the candle on the attic; could not say that they kept lodgers; Kenny said he had liked to be married in his bed; could not give the time, as to minutes or hours, when I knocked at the door; by the back room, mean room which I think had been used as a sitting room; by going I saw only two burned places in the room, wished to clear the benefit of the doubt to the prisoner—could not swear that; the fire brigade put out the fire; I assisted them in coming and placing the hose; the old sofa was in the back room; did not notice the outside of the partition burnt—did not make particular notice; saw a hole cut by the fire brigade in the centre of the attic floor; there was a board over it—did not say over what room this hole was; did not know whether any man of the fire brigades fell through that hole—believe that James Rowe, son-in-law of Kenny; saw the bedsteads on the floor in the eastern end; there was one in each angle; the source of the flame had been in the south-east corner; the top of the roof was much charred; the south-eastern bed was much burned; it is not impossible, but quite improbable, that there was a connection between the fire in each bed; if the boards on the floor were those of the cock-loft the fire might have been placed on them or found its way up; whilst considering such a possibility, was surprised that the boards were charred underneath; found the brush and bottles on the floor in the back room; could not tell whether contents were kerosene oil or turpentine; saw no good furniture about; there were some tools in the basement in a box; am no judge of carpenter's tools; saw no furniture which I considered of value except the clock; don't know anything about the prisoner—subsequently told he was a carpenter; would not consider it extraordinary to see turpentine there, only that the brush, and old rags were there also; did not see any of the things that were lying on the attic floor burned on both sides as quite possible that there might have been some—

examined two or three of them ; what I mean by five distinct and separate fires, those in the three separate parts of the house ; the room door is not at the bottom of the attic stairs, but very near it ; there was no furniture outside before I came there ; when the furniture was put outside I placed police in charge of it.

Re-examined : There were three separate, distinct and unconnected fires, composed of chips and shavings, like a bonfire ; amongst the things found in the house there was an old candlestick—there was verdigris on it—it had the appearance of not being used for some time ; that was the only one I saw—it was commented on at the time as not being apparently in use ; am particularly clear as to my conversation with the prisoner and wife—took notes of them previous to making my night report ; when I saw them they were perfectly cool and collected, and fully dressed ; the only person who appeared troubled was prisoner's daughter—she appeared fretted ; the hole in the attic was not near any of the fires—it was not burned or charred around ; some of the fires burned through ; the fires in the attic might have burned up to the cock-loft, but it is quite improbable that they would have burned so far ; the gable was charred right up—not quite to the top ; it was much charred to the south-eastern end ; saw boards lying on the floor of the attic, but saw no cock-loft.

By the Court : Asked Mrs. Kenny if all the children were out—she said there were none ; saw no lodgers or any one else, but prisoner and his wife, come out of the house ; saw the daughter on the street ; there was a smell of kerosene oil or turpentine on the rags found on the table ; the prisoner was coming out of the house when I had the first conversation with him ; it was about fifty minutes after when I had the second—he then said he was near being burned in his bed ; he was then going from his house ; took notes of his conversations immediately after their occurrence, and read them subsequently in the police office.

John Sullivan, being called and sworn, was examined by the Attorney General, and deposed as follows :—

Am Sergeant of the police force of St. John's ; remembers the night of the 9th and morning of 10th of October last ; was called about ten minutes to one on the morning of the 10th ; was in bed—got up and proceeded with a party of the police force to Maggotty Cove ; saw the fire companies throwing water upon prisoner's house—saw Sergeant McCowen and

Constable Lahey there; when I arrived I saw the fire issuing from the eastern end, between the brick-work and the roof; about half an hour after went into the house and went upstairs; saw the marks of fire in two or three places—told Sergeant McCowen it were best to give the house into charge of the men; Sergeant McCowen, William McGrath, Rowe, and others were at the fire; Kenny was chopping down the ceiling of the attic; went into the house after in company with Francis McGan, William Harris and others—made a minute examination; found two distinct and separate fires in the upstairs room, going the southward—shavings and straw were strewn over the floor; there was the skeleton of an old sofa in the room, which appeared as if the stuffing was all burned; the sofa was against the partition—the floor and partition were partly burned; there were two rooms in front—in the eastern room there had been another fire; there were also shavings in that room partially burned; there was a bedstead in the room, but no bed—there was a pile of shavings in an old room in the attic there were five bedsteads—there had been shavings on three of those bedsteads—on another there was a sack partially filled with shavings in part burned—in the bedstead there was nothing—it had the appearance of shavings upon it, as if what was in it had been burned; the bedsteads on the other side might have been ten or twelve feet long; on the bedstead opposite that with the burned sack were the remains of burned shavings, but no marks of shavings upon the bedstead; three of the bedsteads were pretty close upon the northern side; did not remark any cock-loft—there were some boards scattered about the floor; those I found that were charred on one side—there was whitewash or lime upon the other side; the two bedsteads on the other side might have been about eight or nine feet asunder—they were found; about three o'clock on same day made another examination in the room under the level of the street; this was a room in which a carpenter's bench had been put up—there were shavings lying about and kerosene oil spilled on the floor; some of the shavings in that room had been recently found; found, that morning, on a table in the house, a bottle containing a liquid—either spirits of turpentine or kerosene oil covers both, and a saucer containing some rags saturated with the liquid; the second floor was burned through in two distinct and separate places—that of the attic was burned, but not through; the fire on the attic could not have had communication with those on the second floor.

Cross-examined by Mr. Pinsent: In time of fire sparks fly about in different directions; stairs went up about the centre of the attic; heard the house was insured—heard it from Mr. Rendell on the day of the fire; places mentioned as distinct and separate fires were those burned places discovered after the fire; the furniture was piled up snug and in charge of the police when I arrived; do not know that any difference of opinion exists between me and Sergeant McCowen concerning the fire; did not notice whether the partition of southern room where fire was was burned outside; did not find a candle-stick on the attic—saw one in the shop previous to making examination of the premises—think it was on the right-hand side of the shop on a shelf—would not swear which side; this was before the minute examination.

John Hennessey, being called and sworn, was examined by Mr. Whiteway, and deposed as follows:—

Am member of the Cathedral Fire Brigade; know prisoner's house; remember the night of the fire, but do not recollect the date; was present when the fire was extinguished; I entered the house and went up to the attic—there was a cock-loft over it; started a board from below the cock-loft—saw the sign of fire when I started it; saw no sign of fire underneath board before I started it; cannot say whether any of the boards were burned on the other side—never examined them; the roof was on fire—ran down to put on the water; saw some bedsteads on the attic—did not stay on the attic after putting out the fire; did not examine the bedsteads; was in the house after putting out the fire in the cock-loft; was on the attic—remained only while I was removing the hose—came back with the company; did not stop to examine the house—went away after duty was done; the attic was full of smoke; would not swear that the fire in the cock-loft did not come from the attic—may have originated in the attic and gone to cock-loft; could not say how much of the cock-loft may have been on fire—only saw that part I was at work upon; did not see any of the bedsteads on the attic burning.

Re-examined: If there had been any fire on the attic it had been put out before I got up.

By the Court: The hole was cut in the attic floor for the purpose of getting up the hose—that was after playing on the house from outside; when I cut the hole I got up the hose, and put out the fire on both attic and cock-loft; when I first went on the attic could not see any fire, but subsequently saw fire near the gable-end, close to the roof.

Martin Lahey, being called and sworn, was examined by the Attorney General, and deposed as follows:—

I am one of the police force of St. John's; remember the night of the 9th and morning of the 10th October last; was in command of Sergeant McCowen; we saw from Cochrane Street a fire near the old garrison—proceeded there and found it was the prisoner's house; it was at that time burning at the northern end; heard no alarm given before; did not see prisoner immediately when we went down, but after; Sergeant McCowen asked him how the fire originated, and he said he did not know, as he was at a friend's house when it occurred; did not take part in the after-conversation—was on duty; heard Mrs. Kenny say that it occurred from a candle left on the attic when they went after lodgers; there were no beds or bedding on the stairs when we arrived.

Then examined by Mr. Pinsent: There were only two or three little boys or girls there when we arrived.

Then William Harris (the next witness), being called, Mr. Pinsent objected, stating that he had not received a copy of the witness's deposition; the Attorney General, in reply, submitted that the name of the witness being on the back of the deposition, the witness had a perfect right to be called. The witness was then sworn, was examined by Mr. Whiteway, and deposed as follows:—

I belong to the Phoenix Fire Company; recollects the night of the 9th at the prisoner's house in the neighborhood of Fort William; was at work there putting out the fire; went home with the company—returned, went into the shop and upstairs into the first storey over the kitchen; saw the remains of the sofa and the remains of a sofa near the partition which separated the room from the stairs; the floor was not much damaged at that place—observed other marks of fire in the room; on the south side of the room near the windows the floor was charred through in one place; cannot recollect exactly where in that room those marks were; Mr. Boggan was with me; went to the attic—saw bedsteads there; two were unburned; those that were burned were, as near as I could judge, from seven to ten feet apart; cannot tell whether the roof under them was burned—the roof was burned and charred.

The cock-loft had been taken down before we went there; merely looked at the boards—did not examine them; did not notice whether the roof under the saddle was burned or not; went down through the house—went into two

front rooms over the shop; think there were signs of fire there—am not positive; think a part of the floor was burned—it was the eastern room; think there was a bedstead there—am not quite certain; went to the lower storey under the shop—saw some tools there, glanced around, merely looked at them.

Cross-examined by Mr. Pinsent: Belong to the Phoenix Fire Company—am not first director; am not under the patronage of Phoenix Fire Assurance Co.; went down the second time to prisoner's house through curiosity; may have asked Mr. Boggan to go—do not know; fire is very erratic—hard to account for sparks flying about; am a house carpenter; nothing extraordinary to find kerosene oil or turpentine, or a saucer with kerosene oil on it, in a carpenter's house; cannot tell whether there was any connection between the fires or not.

Re-examined: By going through curiosity, mean that some conversation occurred between Mr. Boggan and me, and that was the result.

Charles Gamberg, being next called and sworn, was examined by the Attorney General, and deposed as follows:—

Belong to the Cathedral Fire Brigade; remember the night and morning the fire occurred; do not recollect the date, and I did not make any note of it; it was opposite the old garrison; was in the house during the fire, and before coming home was in the attic—there was a cock-loft over it; did not see any of the boards disturbed—gave orders to have them removed; discovered a fire in the cock-loft, and also in the attic—they were separate fires; do not believe that they communicated; saw other fires in the house at the time—saw one on the left-hand side of the stairs going up; went into the back room upstairs—saw the sofa there on fire—did not remark any shavings about; saw four separate and distinct fires in the house.

Cross-examined by Mr. Pinsent: It was impossible for the fire at the head of the stairs and that in the cock-loft to have been connected; the attic was an open apartment; knew the prisoner for long time—knew him to be a sober, honest, industrious man; it was late when I got to the fire—do not know what time; saw the prisoner outside all the while—did not see him in the house; when my duty was done I went home—considered it done when the fire was out; I mean by distinct and separate fires, that there was no visible connection between them.

By the Court: When I went into the house before going home it was to see if there might be any more that might

require to be put out; there was a smouldering fire in the sofa—the sofa might be one foot or eighteen inches from the partition where I had seen the fire at the head of the stairs; could not tell whether the fire inside was communicated from the outside or not; when I went inside the room the sofa was on fire, but not blazing—the hay was not burning, and a hole was burned through it; the sofa could not set fire to the partition at the time I saw it; it was after the hole was cut in the attic that I put up the hose.

Thomas Foley, being called and sworn, was examined by the Attorney General, and deposed as follows:

Am Inspector of the Police Force of this colony; know the prisoner; remember visiting his house on the 10th of October last for the purpose of ascertaining the cause of the fire; went through the house—the first floor and attic especially; there appeared to me to be the traces of three distinct and separate fires in the attic; there were some old bedsteads there, but no bedding, except upon one, an old rug; there were on the next floor traces of two distinct and separate fires; there might have been more, but those two were distinct and separate; in the back room, on that floor, there was some furniture—in one of the front rooms a bedstead; was not in the basement or workshop; the police were in charge of the house for some time after; to the best of my opinion they were the remains of distinct and separate fires.

Cross-examined by Mr. Pinsent: There had been no connection whatever between the two on the first floor and those on the attic.

The examination of the last-named witness closed the case for the Crown.

Mr. Pinsent, on behalf of the prisoner, submitted that there was not sufficient proof of the intent, as alleged in the indictment. First, there was no proof of the existence of the Assurance Company; and, in the second place, there was no proof as to whether it was an incorporated body or a company composed of a number of persons; in which case the names of the several parties so associated should have been specified. There was no proof that a policy, if any, had been issued by them under the seal of a corporation, without which it was no proof. In support of his objections the learned counsel cited *Rex vs. Gilson, R. & R., p. 138.*

Attorney General (contra): Submitted that the count in the indictment was comprehensive clear and ample, and was sup-

ported by the evidence. There was positive proof by Mr. Rendell of the existence of the Assurance Company. The prisoner, four years since, received his policy, paid his premium to Mr. Rendell as agent of the company, and continued to pay annually the renewal premiums and received the renewal receipts, and thereby fully recognised the company. As a corporation the company had the power of binding itself without using its common seal—but no exception had been taken by the counsel for the prisoner, when proof of contents of policy was given. He had received notice to produce the original policy and renewal receipts, but had not done so—consequently the prisoner cannot now take advantage of his own neglect. In support of his opinions the learned gentleman cited an authority.

Mr. McNeily followed on behalf of the Crown. Under the Imperial Statute 24 and 25 Vic., cap. 97, sec 60, it is provided that "it shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be.)" It is under the 3rd section of this Act that this indictment was laid. If the words "Phoenix Assurance Co, of London," were not in the indictment, under the evidence such an indictment would necessarily be sustained. Even if the "Phoenix Assurance Co." were a myth, there was evidence of intent to defraud which would sustain a general count, and the style and title of the company might be taken as mere surplusage. But the prisoner was estopped from disputing the existence of the company. He had for years recognized it in a most substantial manner by accepting its policies and paying its premiums to its recognized agent.

As to proof of incorporation, &c., the same remarks applied. It appeared upon the face of the bill of indictment to be a corporate body. It was sworn to have issued its policies to the accused, which were accepted by him. The original policies had been traced to the possession of the accused. He had received notice to produce them and had not seen fit to do so. If they were irregular it was to be assumed that they would have been produced, but, not being produced, secondary evidence of their contents has been permitted. The issue of policies, payment of premiums and attachment of risk having been proved, the maxim "*Omnia presumuntur rite, esse acta*," applied. Everything in default of proof to the contrary should be presumed to be regular.

It followed then, those premises being conceded, that even if there was any pith in the objections of his learned friend, he was then precluded from making them. If they were of any value they should have been made when secondary evidence of the contents of these instruments was tendered by the Crown.

Mr. Pinsent: Had fraud been alleged without any reference to the company it would have been different. There was only one count in the indictment and this particular company was mentioned. There was no evidence of the existence, in law, of such company.

The court ruled that the manner in which the company was set forth in the indictment, implied incorporation, facts in connection therewith established a *prima facie* case of incorporation. Second, if it was a company, evidence showed that the policy was not a contract under the common seal of the company. The time for objection was at the taking of secondary evidence, when the question might have been raised but the Crown being allowed to go on, the counsel for the prisoner was precluded from taking advantage thereof.

Mr. Pinsent, counsel for the prisoner, then addressed the jury to the following effect:

The prisoner at the bar, John Kenny, stood indicted for wilfully and feloniously setting fire to his own house on the 9th of October last, with the intention of defrauding the Phoenix Fire Assurance Co. of London. They had heard the summary of facts from the learned Attorney General, by which as he stated he was about to establish, upon reliable evidence, the charge made against the prisoner in the indictment.

The learned gentleman had been very sympathetic in his observations, particularly in reference to the time selected for the perpetration of such acts, the usual hour being as he said, "that in which the whole community were wrapped in repose, that was the hour in which the incendiary applied the torch to his property relying upon the consciousness of being unseen by any human eye—still there was an All-Seeing Eye, from which his most secret machinations were not concealed." From the evidence adduced on the part of the Crown, there existed strong doubts as to the guilt of the prisoner, who in the event of the establishment of such doubts, must still retain his character. Notwithstanding existing doubts, which were certainly very strong, evidence would also be brought forward which would not only tend still further to confirm those doubts, but by which the prisoner would be enabled to leave that Court with-

out the slightest stain upon his reputation ; and in the possession of that good character which he is admitted upon all hands to have so long enjoyed. Upon them rested the responsibility of the vindication of that character and reputation, of so much consequence, not alone to the prisoner, but also to his family. Not alone the responsibilities, but also the consequences were of so serious a character, that they were bound to sift every particle of evidence against the prisoner, more particularly when those consequences were likely not alone seriously to affect the prisoner himself but also his family. The prisoner, a man verging on 70, and his wife, a creditable old lady, had both lived long and respectably in this community, and had brought up their family. Were they prepared to return such a verdict as would commit this man to a felons cell, and irretrievably injure the prospects of himself and family ? Although they had been told by the Attorney General that the interests of the Crown and of the public were to be protected, the interests of the prisoner were also committed to their charge. It would, however, appear that some victim should be offered up in atonement for the incendiarism alleged to be prevalent in this community, an imputation, however, which he considered as untenable in the absence of proof and which is too often urged when the property of the poor man is accidentally destroyed. In the present instance the agent of the Phoenix Assurance Co. had sworn that the property of the prisoner had been insured for an amount for which he (Mr. Rendell) felt it was well worth, that he had paid his premium regularly ; but now when his property had been destroyed, the company instead of paying him for the loss sustained, had put him on his trial for arson, and wished to consign him to a felon's cell. (Here the learned counsel for the prisoner having referred to some of the evidence on the part of the Crown, continued.) The Fire Companies were certainly an honorable body of men, but he was sorry to have to say that any of their officers should take upon them the role of the detective, and when any man had done so, he should be regarded as actuated by some animus against the prisoner. The witness referred to in his evidence admitted—in his cross-examination had been obliged to swear, that the separate fires might have had a common origin. It had also been admitted in the evidence before them, that fire was erratic in its nature, that it was impossible for anyone to say in what part of the house the fire might have originated. Nothing was more likely than that the bottles, one of which

contained a small quantity of turpentine, should be found in the house of the prisoner, who was a carpenter and was in the habit of doing his work in different parts of the house. What man would be safe if such evidence was allowed to have weight? In the house of what tradesman was not kerosene oil or turpentine to be found? Still the witnesses in cross-examination had been obliged to admit that there was no importance to be attached to those facts. The saucer referred to in evidence had been used for the purpose of receiving the droppings of a leaky kerosene lamp; it showed, however, how trivial the case was, when such a "will o' the wisp" was brought forward. Next, upon the whitewash brush, the sensitive olfactory organs of Mr. Boggan detected the smell of either kerosene or turpentine; but Mrs. Kenny used that brush for certain domestic purposes. All the witnesses had deposed to circumstances connected with the fire, which Mrs. Kenny had admitted was through her neglect. If such was wilful upon her part she should have been included with the prisoner in the indictment; but he did not for one moment mean even to impute any such wilfulness to her. The agent of the company was anxious for a conviction, the prisoner was to be hunted down, a formidable array of counsel was retained, and it was thought necessary that a victim should be offered up on the altar of public justice. All the circumstances of the case should be looked upon with the greatest doubt, and he considered that the difference of opinion between Mr. Boggan and Mr. Rendell as to the origin of the fire in the cockloft alone, left ample room for such doubt. The learned gentleman reviewed at some time the evidence of different members of the fire brigades, and continued. There was not probably one fire in the house which the prisoner or his wife, if produced, could not have accounted for. The shavings in the workshop had been there for days, and in the boiling of a glue-pot, or in other matters connected with his business, it was not unreasonable that a fire might have occurred in that part of the house.

There was next the evidence of some members of the Police Force. He did not mean to cast any reflection upon that force, but the evidence of some of its members was not of a character that implicit reliance could be placed upon it. For instance, Sergeant John R. McCowen said that he was the first who gave the alarm, whereas such was not really the case, as it was a Mr. James Moore, as would be proved, who had first given the alarm and aroused the neighbors, and the children

seen by McCowen were probably those of the neighbors who were then up. As to the conversations alleged to have taken place between the prisoner and the last named witness, it was more than likely that they had taken place, and had got confused and misunderstood by him. The prisoner stated that he had been at a friend's house that evening but not being a man of late hours, was at home, and as stated in the last conversation, and in his voluntary statement, was near being burned in his bed. The fire had not been the consequence of his own hand, but of that of Mrs. Kenny, and there was no evidence of fraudulent removal of furniture. A man in his position may not have very valuable furniture, but still there had been amongst his furniture such articles as a valuable feather bed with other things in the attic; and the amount of £50 was very small indeed to cover the loss of furniture. He was prepared to prove that Mrs. Kenny was the first who gave the alarm to the neighborhood by knocking at the partition between her house and that of Keough, saying at the same time that fire had broken out. There was a most material witness, Bridget Keough, who had been examined at the Police Court, and whose name was on the back of the indictment, but who had been kept back because she could have given evidence favorable to the prisoner. Having made some further review of the Crown evidence, the learned gentleman again resumed. Sergeant McCowen was not the first who gave the alarm, and he should also prove out of the mouth of a witness, the next-door neighbor of the prisoner, one who beyond all others was likely to suffer by the consequences of the fire, that the different fires in the house were the consequences of one original fire. The Crown had not only by the evidence of their own witnesses raised doubts in favor of the prisoner, but had also proved his innocence. The evidence advanced on the part of the Crown had been quite sufficient for that purpose, but his client, the prisoner at the bar, wished, for the sake of his family and friends, to leave that court with a character as unimpeachable as on the 9th of October last. The case of the Crown was full of doubts, each if possible giving stronger proof of his innocence.

The witnesses for the defence were then called as follows :

James Moore, being called and sworn, was examined by Mr. Pinsent, and deposed as follows :

Was watching my hay on the Signal-hill road on the night of the 9th of Oct. last. About 12 o'clock my attention was

attracted by a flame in the direction of Fort William. I went down in about a quarter of an hour—the man who was engaged watching Mr. Lindberg's property accompanied me. When first seen by me, I thought it might be the gas lamp, it was sometimes bright, at another time dim. I met the watchman on the way down the hill. Said to him, this looks something like a fire, if not it is the gas lamp; it was hazy. Went to my own house at the foot of the hill to take a cup of tea; took off my coat and hat. Saw the light blazing in at my windows; went to the door. Saw Mr. Lindberg's man coming down the hill—we ran off together to the scene of the fire; I, being smarter than the old man, arrived first and knocked at the neighbor's doors, that of Mr. Thomas Donahoe in particular—called out "Fire, fire." The prisoner lived next door—the fire then blazed out; I drove in prisoner's door—it was not bolted or barred; I said "Kenny, you will be burned in your house!" Some one said, in reply, "My God, the house is on fire." The prisoner and his wife were in the shop—there was no policeman there when I came; I said to the watchman "Come and assist me, till we take out the things"; he said "I will go and ring the bell"; I said "No, go and watch your master's property"; he went away; I then went to Kough's—drove in the door and lock—called repeatedly before anyone came down stairs; called at Prowse's next door; no policeman or anyone else then on the street.

Cross-examined by the Attorney General: Spoke to Kenny on the night of the fire; in conversation with him at different times since—he said I was the first who arrived; Kenny and Mrs. Kenny were in the shop when I arrived—the fire was breaking out at the end; I could see it through the windows—I think it was at the northward; on going in saw a hole coming down into the shop—it was burning; could not say whether Kenny or Mrs. Kenny were dressed, or whether Kenny had his coat or hat on. It was a few minutes after twelve when I was watching my hay; came down in a few minutes—did not remain to finish the cup of tea, but ran immediately to Kenny's; arrived there in about two minutes—think by the clock it would have been about a quarter of an hour from the time I first saw the fire until my arrival at Kenny's; drove in the door—it was not barred inside—drove in the latch; never went further than shop door—it was not bolted or barred; the neighborhood was quite quiet; I said "Kenny, your house will be burned"; some one replied, "My God, we will be all burned." Upon coming

out from Kough's met Kenny a second time; when I first went to Kenny's saw the hole in the shop—had not much conversation then as I went to give the alarm next door My house is situated a few yards from the bridge, at the foot of the hill; the fire was blazing through the gable end when I went out.

By the Court: Did not see anyone in the house but prisoner and wife; went different times to Kough's—helped them out with many things—took nothing out of Kenny's; Kenny and wife were dressed—cannot say what clothing she had on; was only once at Kenny's house—was kicking and calling for some minutes at Kough's; they appeared to be packing upstairs, and answered; the reason I called was, I was afraid some of them might not be able to come down stairs, and that if the fire broke in on them they could not come down; when I went to Kenny's the hole was burning in the shop—the fire was in the northeast part of the house some yards from the shop.

Re-examined: Do not think Kenny had any hat on—cannot say whether he had a coat on or not.

Margaret Kough, being next called and sworn, was examined by Mr Pinsent, and deposed as follows:

Am daughter of Peter Kough, next-door neighbor of the prisoner; remember the night of the fire; Mrs. Kenny first alarmed us that night by knocking at the front door; I was the first awakened and then awoke my father and mother. Have seen a saucer at Kenny's used for receiving the droppings of a leaky kerosene lamp; know nothing about the brush

Cross-examined by Attorney General: Live next door to Kenny's; cannot say how long after Mrs. Kenny Moore knocked—it might be about ten minutes; did not hear the police knock—saw that some time after; saw the prisoner—he did not knock; heard no knocking at the partition—partition is of single board—slept at the further end of the house; Moore made a great deal of noise; heard no noise before Mrs. Kenny knocked at the door—she said the upstairs was on fire; do not know whether she meant first floor or attic—she said "Come down"; when Mrs. Kenny knocked the bar was on the door—I took the bar off, and, before going up again, closed the door; when I looked out of the door did not see any of Mrs. Kenny's furniture in the street—it was a fine night; did not see much appearance of the fire—it was only then commencing—ten minutes after it was well under way; was not at Kenny's since the fire—heard nothing about the fire down below where prisoner used to work; could not exactly say whether Moore

came upstairs first, he did afterwards to assist in removal of things; could not say what was the time, as the clock was not going; did not see the prisoner when I came down—Mrs. Kenny went away immediately.

Re-examined: Mrs. Kenny might have knocked at the partition—did not hear her.

By the Court: The police came some time after Moore; father and mother were asleep when Mrs. Kenny knocked; Mrs. Kenny knocked about ten minutes before Moore.

Peter Kough, being called and sworn, was examined by Mr. Pinsent, and deposed as follows:

Am next-door neighbor of the prisoner; he is a good man, so far as I know; remember the night of the fire—was in the house since; the stairs leading to the attic is more like a step-ladder than a stairs; the partition beyond the door, near the stairs, bulged out and had a hole in it; to the best of my knowledge and belief, fire coming from the attic took the skirting board and burned through the partition into the sofa; to the best of my knowledge and belief, all the fires on that floor and attic were caused by one; no one can account for fire when once it is lit up.

Cross-examined by the Attorney General: Am a carpenter—believe I have some knowledge of combustibles; fire is very erratic—if air once comes near it there is no accounting for it; to the best of my knowledge and belief it originated within eight feet, ten inches of my gable-end; the prisoner showed me all through the house—he was authorized to do so; never had any quarrel with him; am of opinion that he had nothing to do with the fire; he was authorized by his lawyer to have an examination, and never had any conversation about the fire with me, either before or since; the prisoner said I might as well earn the money as another; saw shavings under the carpenter's bench—there was a large quantity; was told by Mrs. Kenny, long before the fire occurred, that the fire in the basement had been caused by a match carelessly thrown there by her after lighting a lamp; do not know when I am to be paid—received no promissory note—was not promised to be paid out of the insurance money; from examination of the house, I arrived at the conclusion that the fires in the second storey were communicated from the attic; there was another engaged in the examination who formed the same opinion; did not hear Moore making any noise—saw him upstairs afterwards; it was Mrs. Kenny who first alarmed us; I had my bed packed up in

the shop, one side of the door open; Mrs. Kenny said "Come down, come down, the attic is on fire"; my girl alarmed me and my wife; when I got up could see no fire at first.

By the Court: Surveyed the house last Tuesday; never was inside the house from the time of the fire until Tuesday last.

Re-examined: The fire in the basement which had been caused by the match had nothing whatever to do with the other fires; Thomas Murphy and I examined the house—he is of the same opinion; if the fires in the attic had been of an incendiary character the least fire thrown upon the shavings there would have caused all to blaze; when I saw Kenny at the time of the fire he was in his shirt-sleeves.

Re-examined by the Court: A long time before the last fire, Mrs. Kenny told me she was near setting fire to the house with a match; she said, after lighting a candle or lamp for some purpose, she threw the match from her, and after some time the shavings ignited. Saw Kenny and wife on Tuesday—when I went to the house to investigate the large fire he requested me to go below, in consequence, he said, of reports which had gone abroad concerning it; heard no noise at the time of the fire before I was alarmed by my daughter; the next partition to where I slept is double ceiled on the stud.

The next witness, Thomas Murphy, being called, but not being in court, Mr. Pinsent stated that the witness last called had been in attendance, but was unavoidably absent, as, being a tradesman, he had consequently been obliged to return to his work; the evidence for the defence being thereby shortened the prisoner had to rely upon the weakness of that of the Crown. The learned counsel here reviewed some of the evidence on the part of the Crown, contrasting it with that of the defence, in the first place that of Sergeant McCowen and Mr. Moore concerning the first alarm given, and further stated that if the prisoner's wife could be brought forward as a witness, which unfortunately could not be done, it would probably alter the case most materially, as she in all probability could account in a satisfactory manner for the origin of the fire.

The learned counsel for the prisoner continued still further to review the evidence on both sides at some length, and concluded by referring to that of Peter Kough, who, he said, being the next-door neighbor of the prisoner and being most likely to suffer from the consequences of the fire, would, in his (Mr. P's) opinion, be unwilling to give evidence in favor of the prisoner if guilty of the charges imputed to him by the Crown.

The case for the defence being here closed, the Attorney General again addressed the jury.

The Chief Justice then charged the jury in a clear and explanatory manner, elucidating the facts and reviewing the evidence of different witnesses as he proceeded. The following is a summary of His Lordship's charge:—

The prisoner was charged with having wilfully and feloniously set fire to his house on the night of the 9th of October last with the intention of defrauding the Phoenix Fire Assurance Co., of London—to this charge he had pleaded "not guilty." They had heard the evidence on both sides, and if, after hearing that evidence, there should exist in their minds any reasonable doubt or uncertainty as to his commission of the crime, it would be their duty to acquit him. But if, on the other hand, they should be convinced that he had done so, with the intent to defraud the company as alleged, it would be their duty to find him guilty. This duty would be, no doubt, unpleasant to them, as it would be to all other juries under similar circumstances. It was certainly painful to see a man at the prisoner's time of life placed in such a position, more particularly one who had borne such a good character amongst his neighbors. In a case where the evidence is nicely balanced between the Crown and the prisoner, character is very often a point of great importance; but he should also tell them that where evidence is sufficiently clear as to the guilt of the prisoner, evidence of character was more matter of consideration for the court than for the jury. If the guilt of the prisoner should be established by the evidence, and that he previously should have had the fortune to be possessed of a good character, it would be but adding one more to the many cases coming within their own experience of persons who, having for a long period maintained their characters, in an evil hour had yielded to temptation. The evidence in the case under consideration of the court was, as the learned Attorney General had observed, almost wholly circumstantial, by which, although the prisoner might not actually have been seen to commit the offence, still a number of circumstances or facts being brought together and connected, a chain of evidence is established upon which was based the charge against the prisoner. The questions to be determined were two—first, as to whether the prisoner had committed the offence, and second, whether he had done so with intent to defraud. Upon the question as to the setting fire to the house, the Crown put the case thus: there had been

in the house several separate, distinct and unconnected fires—that those were not accidental, and must, therefore, have been wilful—who were the inmates of the house? None, except the prisoner (Kenny) and his wife—there did not appear to have been any lodgers. Then the motive was that the prisoner had an insurance on his property. Next, in relation to his conduct at the time of the fire, evidence was adduced for the purpose of establishing his guilt. It was unnecessary that he should go through the entire evidence, but if the jury should be desirous of hearing any portion of it before rendering their verdict the Court would read it for their information. He, however, considered that the evidence must be fresh in their minds, as the learned counsel on both sides had already referred to it in the course of their observations. The evidence of the first witness on the part of the Crown, Mr. Francis Boggan, being of an important character, he would first refer to it for their information. [His Lordship having reviewed portions of Mr. Boggan's evidence, continued]: The learned counsel for the prisoner had, in the course of his observations, referred in rather strong terms to the connection of this witness, as also of Mr. Rendell, agent of the Phoenix Fire Assurance Co., with this case. Whilst agreeing with the learned gentleman as to the high character of the Volunteer Fire companies, he, however, should differ with him as to his opinion of their duties. As to the agent of the Phoenix Fire Assurance Co., Mr. Rendell, that gentleman, by his co-operation in bringing the prisoner to justice, was but simply acting in discharge of his duty; as also the police, who in common with the firemen, were entitled to the thanks of the community. He particularly disagreed with the learned counsel for the prisoner in the opinion that firemen, in the investigation of the causes of fire, went beyond their duty, as he (the Chief Justice) felt called upon to say that in doing so they but acted in the discharge of their duty. [His Lordship here reviewed the evidence of Mr. Rendell, comparing it with that of the previous witness, and next reviewed in order the evidence of various Crown witnesses, commenting upon and elucidating the facts in connection therewith as he proceeded. Having reviewed the Crown evidence, His Lordship next proceeded to review that of the defence in a similar manner and with equal perspicuity as in the former. In conclusion, His Lordship observed]: The evidence of Peter Kough was certainly most remarkable. It was for the jury to contrast Kough's evidence with that of other witnesses, and, having

done so, to say whether they should credit his testimony in preference to that of so many others who had spoken so clearly and positively on the subject. All the evidence was to be carefully weighed and impartially considered by them as an honest jury in the faithful and independent discharge of their duty as protectors of the interests of society, and if they saw a good, reasonable and substantial doubt they were to give the prisoner the full benefit of it. But if, on the contrary, they were convinced from the evidence of his guilt, however painful it might be to their feelings, they were bound to return a verdict accordingly.

The jury then, about a quarter to five p. m., retired, and returned into court about six with a verdict of guilty.

The prisoner was sentenced to twelve months' imprisonment.

## DOYLE v. BARTLETT.

1872, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Trover—Seals panned on ice fields—Reducing into possession—Abandonment—Recovery—Gift of seals panned on ice fields not reduced into possession—Practice—New trial.*

In an action of trover brought to recover the value of eight hundred seals alleged to have been wrongfully taken at the seal-fishery, it appeared that the plaintiff had found a quantity of seals panned and flagged by one White, who had abandoned them himself, but had sent a message to the defendant that he might take the seals so left on the ice. The defendant proceeded to the locality where the seals were and found that the plaintiff had taken some of them on board his vessel, had counted others of the patch, and was in the act of taking on board his vessel the remainder, his crew then being in charge. The defendant then took charge of the remainder of the seals and had them conveyed on board his own vessel, and refused to permit the plaintiff to participate in the same. In an action by the plaintiff for the seals so taken the jury found for the plaintiff; on a rule nisi to set aside the verdict,

*Held*—Making the rule absolute (Hayward, J., differing),—there was a valid gift from White to the defendant such as would cause a legal transfer of property; and further, it was in the power of White to transfer property floating on the sea which he had himself the power to secure.

*Held*—The principle of constructive possession of the whole by reason of possession of a part does not apply in the case of seals situated as these were, in relation to mere finders who were not killers.

THIS case was a rule *nisi* to enter a non-suit or set aside, as contrary to evidence, a verdict obtained by the plaintiff in an action of trover, tried last November in the Northern Circuit Court before me at Harbor Grace.

The main facts of the case are as follows :

In the month of April, 1870, the schooner *Native Lass*, Doyle, master, was engaged in the prosecution of the seal-fishery off the island of Fogo, and, about seven or eight o'clock in the morning of the 8th of the month, Doyle, seeing a flag flying in the ice about two or three miles off, sent his crew out to it.

When the men left the vessel the weather was thick and no other vessels could be seen, but, as they neared the flag, the weather clearing somewhat, they saw on the other side of the flag, seven or eight miles away, as they alleged, and working through the ice with sails and steam, two steam ships, both of which they had noticed in the ice the day before, and which, as afterwards appeared, were the *Nimrod*, Capt. White, and the *Panther*, commanded by the defendant.

On arriving at the flag they found it to be a house-flag of Messrs. Job Brothers, placed apparently, with another flag and with pieces of canvas marked "*Nimrod*, E. White," for the purpose of distinguishing three pans of piled and sculpted seals, several of which were similarly marked.

After consulting together, Doyle's men, under the belief, as they swore, that, there being no one left to watch these seals, they might be appropriated by the first finder, took down the flags and removed the canvas badges, and, while two of their number remained to watch the seals, the rest returned each with a tow to the *Native Lass*.

After depositing their tows on board they returned to the pans, but found there a large number of the defendant's men, who, acting as appeared under directions received from the owner (White) to take these seals and bring him his flag, prevented Doyle's men from further interfering with the seals, and themselves took them on board the *Panther*.

At the close of the plaintiff's case defendant's counsel moved for a non-suit, on the ground that the plaintiff had shown neither property or right of possession in the seals; but I declined to stop the case, and the defendant proceeded to justify the taking under the authority of White's directions above mentioned.

The jury were directed that in default of a general abandonment by White of his property in the seals, which the evidence

did not seem to establish, the plaintiff had no right to take them; but that, although they had no right as against White, their mere possession, which for the determination of this trial the jury were to assume, would give them a right of action against any other wrong-doer who deprived them of such possession; that the main question was, were the defendants wrong-doers; if so, the jury should find for the plaintiffs, but that, if they acted by the direction and under the authority of White, they were not wrong-doers, and the verdict should be for the defendants.

The jury found for the plaintiffs for eight hundred seals, at 13s. 4d., \$2,132.22.

After hearing the argument on the rule and fully considering the circumstances of this case, I am of opinion that, except as to two hundred seals, of which there is some slight evidence to show that the plaintiff's men took possession by counting, the plaintiffs did not establish a *prima facie* case. They had no property in *any* of the seals, and the remainder of them beyond the two hundred they neither took possession of nor had they any right of possession to them, and for these, therefore, they could not maintain either trespass or trover, (*Chitty on Pleading*, p. 167), and on this account alone the verdict should be set aside. I think it unnecessary, however, to dwell upon this point, because I am of opinion that the defendants established a good defence upon the merits.

When White, on the morning of the 8th of April, directed the defendant's men to take these seals and bring him his flag, he was the absolute owner of them—*Clift vs. Keane, Supreme Court, 1870*.—and, moreover, could, had he felt disposed, have brought them on board the *Nimrod*, for he was not above two miles from the pan, and although, by reason of Doyle's men having previously removed his flags, he may for the time have lost sight of it, his men knew where it was and could without difficulty have found it and taken the seals. Being the owner of these seals, and having, therefore, the right himself to take them, he could authorize Bartlett to take them, for what a man may lawfully do himself in his own affairs he may authorize another to do for him,—*Story on Agency*, p. 2; and Bartlett, having by White's authority and under his directions taken the seals, could justify such taking against any mere wrong-doer such as Doyle was,—*10 C. B. N. S. 721*.

Mr. Winter, however, contended that White in what he said did not intend to authorize Bartlett to take the seals on his

(White's) behalf, but meant to give them to him, and that such gift was void for want of delivery; but I am of opinion that the question of intention was between White and Bartlett only; that whatever was White's intention, and it is not clear what his intention was, his language, if language has any meaning, conveyed an express authority to Bartlett *to take*, either for himself or for White; that Bartlett became *pro hac vice* the agent or servant of White, and that, as the authority thus given would doubtless have rendered White liable to trespass had the taking been wrongful, so it would avail to justify Bartlett, the taking being rightful; Bartlett's defence, in short, is in another form, the very common precedent of one justifying a trespass by command of another in whom the property in the land or chattel was.—3 *Chitty's Pleading*, 346.

By assuming that White did intend to transfer the property in the seals to Bartlett, it would not necessarily follow that the gift was void because a transfer of possession did not accompany his words.

The case of *Irons and Smallpiece*, 2 B. & Ald., upon which Mr. Winter relied as an authority for the position that delivery or a deed is necessary to constitute a valid gift of a chattel, has been frequently questioned—2 M. & G., 691; 2 *Saund.* 47, *Bd.*; 1 C. B. 381, and 7, *Ex.* 581,—as it has also been approved and recognised.—*Fisher's Dig.*, 1870, p. 33; 18 C. B. N. S., 615.

But, taking for granted that it lays down the law correctly for cases to which it applies, the circumstances of the present case fall, not within it, but under those of *Hudson & Hudson*, cited in 2 *Saunders*, 47 B. D., in which it was held that if A in London gives B his goods at York, and, while B is proceeding to take possession, a stranger takes them away, B shall have trespass or trover against the wrong-doer; and of *Winter and Winter*, 9 W. R. 747, a very recent case, in which it was held that a formal delivery of a chattel is not necessary to perfect a gift, and that it is sufficient that the donee proceeds in accordance with the gift and takes possession.

Now, here White, so far as he could (the subject of the gift being at a distance), transferred his right, and Bartlett, by proceeding and taking possession in accordance with the intention of the donor, perfected the gift, and thus gained a complete title to the seals.

As regards the claim of Doyle to hold under White's alleged abandonment, it seems to me to be wholly untenable. The only evidence of any abandonment by White is the authority given.

to Bartlett and White's subsequent departure. But, if this were an abandonment, it was mainly a special one limited to Bartlett alone, such as White, having a power to abandon generally, could certainly make, for the greater power necessarily includes the lesser.

If, on the other hand, White had no such power, and the abandonment, so called, was inoperative, clearly neither Doyle nor anyone else could make title under it.

The departure cannot be separated from the assignment to Bartlett and construed into a general abandonment, because a general abandonment necessarily involves the assent of the owner to the chattel becoming the property of the first finder; but the assent of White was only to the seals becoming the property of Bartlett; if the assignment failed in that it failed altogether, and the property remained in White.

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HON. MR. JUSTICE ROBINSON:

This cause was tried in Harbor Grace last term before the Chief Justice, and resulted in a verdict in favor of the plaintiff for \$2,132.32, being the value of eight hundred seals at 13s. 4d.

A rule *nisi* was obtained, returnable before this court, to set that verdict aside, on three grounds: 1st—Because it was contrary to evidence; 2nd—Because evidence was improperly rejected; 3rd—Because the plaintiff had neither possession nor property in any of the seals, and should, therefore, have become non-suit.

To consider these grounds in their inverse order I am of opinion that the plaintiff should not have been non-suited, because he had both property and possession in some of the seals of which the defendant deprived him, and *pro tanto* had a good cause of action. I am next of opinion that the evidence refused was properly rejected, and on both those grounds the defendant has failed; but, on his first objection I think he is entitled to succeed, because the amount of the verdict is much larger than the evidence warrants.

Where a party has obtained from a jury a verdict of which the court deprives him, he may fairly expect to see the reasons on which the court acts, and, therefore, I will briefly state the grounds of my judgment.

None of these eight hundred seals were killed by the plaintiff; they had been killed, piled, marked and flagged by the

crew of the steamship *Nimrod*, White, master, about fifteen days before the plaintiff found them.

On the morning of the 8th April the plaintiff stumbled upon these seals in a fog; he found them with all the *indicia* of property above detailed, he knew they were not his, and he appears to have known by whom they had been killed, but, because as he says, "he saw no man in actual charge of them," he removed White's ensigns, struck all his flags, and proceeded to carry away to his own vessel the seals. At this time Capt. White was distant—some say nine miles, some say two miles,—and if he had not abandoned the pursuit of these seals and could have secured them on board his vessel but for the intervention of the plaintiff, I am of opinion that by law he would have been entitled to have recovered the full value of every one so taken by the plaintiff, and it is owing to an accident—of which the plaintiff was at the time ignorant,—namely, the abandonment by White, that he is by law warranted in holding any of them. It appears that on the morning of the 8th April, Capt. White—who had secured on board the *Nimrod* a large cargo, even to a deck load—either from not having room for more, or because under existing circumstances he deemed it hazardous to push his vessel or his men into the ice where these eight hundred seals lay (as well as several thousands more seals that had been killed by him), determined to bear up for home and abandon all further pursuit of them.

Before bearing up he sent a message to the defendant, who commanded the steamship *Panther*, that he might take seals which White had left on the ice, bringing to him his flags, and, under colour of this authority, the defendant's crew came upon the pans where the plaintiff's men already were, and by virtue of their larger number carried on board the *Panther* the eight hundred seals.

The first question that was raised in the argument was, whether the verbal gift of the seals by White to Bartlett passed any property whatever to the donee, and upon that point there are conflicting authorities and the law is unsettled; but, according to my view, no necessity arises to determine that question, because it seems to me that White had not perfected his ownership of these seals, and, not having any right in himself, could not convey to another by any mode or instrument what he did not possess.

The grounds upon which I rest this opinion were fully stated by me in *Clift vs. Kane*, determined in March, 1870.

I held, in that case, conformably as I believed with the established law of the land, that to enable anyone to acquire private property in animals *feræ naturæ*, he must either actually have secured them in complete possession or have been (when interrupted by a wrong-doer) in a position to reduce them under his complete control, and that such control could not be said to have been completed so long as they continued floating about beyond his power to recover.

The facts in the present case seem to me singularly illustrative of the reasonableuess, if not absolute necessity of such a doctrine.

It appears that in the latter end of March Captain White spread his numerous crew over a circuit of eight miles of ice, killing seals in all directions, leaving them where they were killed, and hoisting flags until at one time he had thirty-two ensigns flying over that vast area. Several thousands of these seals he appears never again to have reached or even to have seen, and, practically, he was as incapable of appropriating them to his own use as if he had never left port. Now, with great respect for those who entertain a different opinion, I cannot bring myself to believe that a man can consistently with law establish any claim whatsoever to wild animals which he had failed to capture, or can prevent others engaged in the same adventure from appropriating to their own use dead seals after the killer of them had left them adrift upon the ocean and demonstrated his inability to reclaim them. Still, in the absence of legislative enactment differences of opinion may and do arise in courts of justice upon the subject, for the seal-fishery is an enterprise peculiar in many of its features and in which circumstances are likely to occur wherein it is difficult to apply strict legal principles. The very element upon which it is carried on has no parallel as the scene of any other trade or business. It is conducted upon ice-fields that partake of the solidity of land and of the mobility of water, and the dominion which a hunter acquires over a wild animal by the mere act of killing it upon land is by no means as surely acquired over a seal on the ice, which is often as difficult to secure when dead as when living; it behoves, therefore, all engaged in such an adventure to act in a spirit of mutual concession, and, in pursuing their own interests, not to ignore the fair claims of *fellow-laborers*.

In my opinion it may safely be affirmed that so long as the killer of seals has the "*animus revertendi*," combined with the

*potentia recuperandi*, no one has a legal right to interfere with him, but the moment he abandons the pursuit of the dead animals, either from inability to reach them or incapacity to stow them, that moment they revert to the common stock and again become the prize of the first finder who can secure them.

In this case Doyle was the first finder of the seals White had killed, but before he could secure them by manual possession Bartlett appeared upon the scene; thenceforth it became a race between the two crews as to which of them should take most, and each of them became the owners of just as many as and no more than they respectively secured by manual possession; the principle of constructive possession of the whole by reason of the possession of a part does not, in my opinion, apply to the case of seals situated as these were in relation to mere finders who were not killers.

There is some evidence that Doyle counted, handled and thus became actually possessed of two hundred of these seals, which defendant took away when he swept off the remainder of the eight hundred, and to these two hundred I hold Doyle to be entitled. Bartlett had just the same right to seize the remainder as Doyle had to seize the two hundred, and the verdict against Bartlett for more than the value of the two hundred seals is untenable, and it should be set aside unless the plaintiff shall consent to reduce it to £133 6s. 8d., cy., which is the value of the two hundred seals, in which event the rule *nisi* ought to be discharged.

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HON. MR. JUSTICE HAYWARD:

This action was taken in the Northern Circuit Court at Harbor Grace to recover from the defendant the value of eight hundred seal pelts taken by him and alleged to be the property of the plaintiff, and it was tried in last November term before the learned Chief Justice and a special jury.

It appeared at the trial that the crew of the s. s. *Nimrod*, Capt. White, in the spring of 1870, during the prosecution of the seal-fishery, killed and sculped a large quantity of seals in a circumference of about seven or eight miles; that these seals were not taken on board the vessel, but were bulked and flagged within that space on numerous pans of ice in different directions, requiring thirty-two flags to mark their different localities; that these seals were all killed before the 23rd March: that on the 28th the *Nimrod* commenced taking them on board

and continued to do so until the 8th of April. On that day the plaintiff, who was prosecuting the same fishery in a sailing vessel called the *Native Lass*, met with three bulks of seals near together, numbering between eight hundred and nine hundred, and which are not denied to be some of those killed, bulked and flagged by the *Nimrod's* crew. The plaintiff's crew alleged that no vessels were then to be seen, nor were any persons in charge of the seals, and, after some time given for consideration, they came to the conclusion (to use their own words) "that they were a lawful prize," and that they would take possession of them as such; they then took down the flag and seized the whole "as a prize," and hauled sixty of them to their vessel, leaving two of their crew in charge of the remainder until they should return, and, the weather becoming clearer, they discovered two steamers at a considerable distance off—some of the witnesses say three miles distant, whilst others say nine miles—and that one of those steamers (which appears to have been the *Nimrod*) was bearing away from the seals in question; but it appears from other evidence that she was steaming to and fro, completing her cargo with the seals that were near her. The plaintiff's crew, after completing their first turn, returned for the remainder, and upon their arrival found that the defendant's crew (belonging to the s. s. *Panther*) were there and disputed with them the right to the seals, alleging that Capt. White, of the *Nimrod*, had authorized them to take them, and they, far outnumbering the plaintiff's crew, took the seals in charge, prevented the latter putting any more of them on board their vessel, and some hours afterwards the *Panther* steamed to the spot and they were put on board her. Before the defendant's crew had interfered with the plaintiffs the latter had counted the seals on two of the pans, one of which numbered one hundred and thirty and the other seventy, the third pan they did not number, but they estimated that it contained six hundred.

It does not appear that Capt. White interfered with these seals after their being bulked, and the evidence shows either that his vessel was fully laden (there being a large quantity on deck) or else that he would not risk her in the place where those seals were, and, therefore, he abandoned them; for, by the testimony of his own crew, it appeared that when they were some miles away and going for a trip of other seals they were informed by him that that would be their last, and he authorized them to tell the defendant that he could have the seals that had been left.

It does not appear whether this had reference only to the seals taken by the plaintiff or whether it also had reference to about three thousand other seals that his crew had killed and which they were unable to or did not find.

Under these alleged facts in proof upon the trial, the jury returned a verdict for the plaintiff of \$2,132.32, the value of eight hundred seals at 13s. 4d. each, and subsequently a rule *nisi* was obtained returnable into this court to set the verdict aside upon these grounds, viz.: that evidence was rejected upon the trial that should have been abandoned; that the verdict was contrary to evidence; and that the plaintiff had no possession of or property in any of the seals.

After full consideration of the case, I am of opinion that the evidence in question was hear-say and properly rejected, and as to the other grounds, I do not think that the verdict was contrary to evidence or that the plaintiff had not sufficient property in or possession of the seals to enable him to support this action.

Where property is entirely abandoned by the owner it is clear that it may lawfully be taken possession of by the first fortunate finder, who has a right to convert it to his own use. These seals had been killed and floating about on the sea for upwards of sixteen days before they were met with by the plaintiff, and although they were not, as far as it appears, abandoned by the owner at that time, yet, as there were no vessels in sight when they were discovered, or, if there were any, they were several miles distant, the plaintiff might have reasonably conjectured that they had been abandoned and that he would be justified in taking them as "a lawful prize," and his claim is favored by the fact that although they were not, as far as we can judge, absolutely abandoned at the time, they were altogether abandoned by the lawful owner long before that day had expired, and the plaintiff did not in any way contribute towards that abandonment by taking down the flags, for the evidence of the *Nimrod's* crew shows that they saw the flags that day and knew where the seals were.

I have no doubt that if Capt White had been prevented by the act of the plaintiff from getting his seals on board his vessel he could have recovered from him any quantity that he had appropriated to his use, but I am also of opinion from the evidence that no act of the plaintiff occasioned his abandonment of the seals but that he voluntarily abandoned and thereby relinquished all claim to them, and, his claim being extinct,

they became the property of those who had them in possession ; and here, again, the important question arises as to whether the plaintiff had such a possession in law of the whole as would entitle him to hold them and sustain this action.

As to the seals which the crew of the plaintiff counted themselves, and took manual possession of in doing so, I have no doubt, and, with regard to the remainder, I am of opinion that the plaintiff had, under the circumstances of this case, such a constructive possession after the abandonment by taking part on board his vessel, by counting others and placing his men in charge of the remainder of those which he actually found, as would enable him to support this action.

It would be otherwise had there been any other seals on the ice, mixed or in proximity with those in question so as to raise a doubt as to their identity, as it might then be reasonably urged by the defendant that the plaintiff had not legal possession of any particular or ascertainable part ; but in this case the three bulks were separate and distinct from all others, and no doubt could exist as to their being the identical seals found by the plaintiff, who adopted the only course that he possibly could to keep his possession secure, and had the means and power available to put all the seals on board his vessel if he had not been interfered with and prevented by the defendant from so doing.

The defendant claimed the right to take those seals because Capt. White had told some of his crew when they were going for their last turn, and when he appears to have abandoned the taking of them himself, to tell the defendant that he might have them, and this message being conveyed to one of defendant's crew he proceeded and took possession as before stated.

With regard to his right to do so I am of opinion that this was not such a gift from White to defendant as would create a legal transfer of property, and also that it was not in the power of Capt. White to transfer to the defendant that property floating on the sea which he had not in himself the power to secure.

Under these circumstances, I think that the rule should be discharged.

*Mr. Pinsent, Q. C., and Mr. Winter* for plaintiff.

*Mr. Carter Q. C., and Mr. Emerson* for defendant.

1872, *July*. HON. SIR H. HOYLES, C. J.

*Insolvency—Trustees' commission—Principle upon which trustees' commission is based—Right of trustee to charge brokerage.*

A trustee in insolvency is entitled to a commission, not merely on the proceeds of goods of the insolvent estate sold by him, but also on property of any description of an ascertained value which by his care and labor he has secured and made available for the benefit of the creditors, and as to which he has incurred responsibility. He is not (*e. g.*) entitled to commission on bank shares held under a lien by third parties for their full value, nor on landed or other property in which under the vesting order the title is in him, and which by reason of a deed of composition with creditors is re-conveyed by the trustee to the insolvent.

A trustee is not permitted to charge for his services as broker in any matter connected with his office.

IN this estate an order was had on the 5th of August last, at the instance of Messrs. Ridley, to refer to the master for examination, inquiry and report the accounts of the estate filed by the trustees, Messrs. Prowse and Mare.

The accounts contained, with other particulars, a statement shewing sales of property to the amount of £42,459 9s. 9d., and containing charges against this sum: first, of a commission on the whole amount of five per cent., making £2,122 19s. 6d.; secondly, of commission amounting to £130 on the cargo of a vessel, the *Mary Saunders*; thirdly, of brokerage to the amount of £28 10s., for services performed by the trustees in relation to the charters of the *Maid of Mona* and two other vessels; and fourthly, of rent to the amount of £100 for the use of one of Mr. Prowse's stores.

Before the master Messrs. Ridley contended that the general commission charged by the trustees should be reduced at least one-half; that the commission on the cargo of the *Mary Saunders* and the charge by way of brokerage should be disallowed; that the charge for rent should be reduced to £50; and that the trustees should be charged: (1) with certain differences on the price of goods of the estate had by Mr. Prowse for his own use at an undervalue, as alleged; (2) with a proportion of a sum of £100 paid to them by the Alliance Bank for superintending the outfitting of steamers of the estate mortgaged to the bank; and (3) with loss arising from unseasonable sales of salt and other articles, and from the neglect of the trustees in relation to the management of the insolvent estate of Thomey, a debtor of Ridley's estate.

The trustees, contending that no such deductions and charges should be sustained, filed, after the reference was ordered, a supplemental account, by which they claimed further commission to the amount of about £3,600 upon uncollected debts and upon property of the estate not sold by the trustees, but vested in and to a partial extent dealt with by them in that capacity.

It appeared by the evidence that about the middle of October, 1870, the Messrs. Ridley being in difficulties, had, with the advice of their principal creditors, made an assignment of their property to Mr. Prowse as trustee, under which he was to receive for his trouble in realizing and winding up the estate, besides necessary disbursements, a commission of two and one half per cent. on certain fish and oil, and of five per cent. upon other property, the deed being subject to a defeasance in the event of the assignors effecting a compromise with their creditors; but that, in the beginning of November following, it was thought expedient to declare the estate insolvent, when Messrs. Prowse and Mare being appointed trustees, Mr. Prowse proceeded to Harbor Grace to manage the estate there, while Mr. Mare was to transact that part of the business which was to be done in St. John's.

That about the middle of January the assignors came to terms with their creditors for a composition, and Mr. Prowse returned to St. John's, and about the 10th of February, the proposed arrangements having been perfected, the estate undisposed of was reconveyed to the assignors and the trustees ceased to have any further connection with it.

The master, after hearing the parties and examining a number of witnesses, reported that in his opinion a commission of five per cent. on the proceeds of so much of the property sold as was applied in discharge of preferable claims (about £27,000) and a commission of two and one-half per cent. upon the balance of the £42,459, making together a sum of £1,753 19s. 6d., would be a fair allowance to be made to the trustees for their trouble and superintendence in the management of the estate. He reduced the rent claimed for the store to £75, disallowed the charges in relation to the *Mary Saunders* (other than the cost of the telegrams) and the claim for brokerage, and declined to adjudicate upon the charges concerning the sum paid for fitting out the steamers, the losses arising from injudicious sales, and from the mis-management of Thomey's estate and the alleged undervaluation of shop goods, on the ground that these matters were not within the scope of the reference.

To this report exceptions in accordance with the views advocated before the master, were taken by both parties and argued very fully in the December and February terms of the Supreme Court, and of these we have now to dispose

As regards the amount fixed by the master for rent of the store, and his disallowance of commission on the *Mary Saunders'* cargo, and of the brokerage, we confirm the report. As to the first, because on a mere question of fact we see no sufficient ground for interfering with the master's judgment on a subject which he is very competent to determine and upon which he has had the advantage of hearing *viva voce* testimony. As to the second item, for the same reason that influenced the master, namely, that this cargo never came under the control or into the possession of the trustees, nor was it made available by them for the benefit of the creditors. As to the brokerage, because the rule of law that forbids trustees charging for their services as brokers in any matter connected with their office is so stringent that we feel the master did right in observing it, notwithstanding the meritorious services here performed, and although, but for this rule, the charge might fairly have been allowed by reason of the personal responsibility voluntarily incurred by Mr. Mare in order to relieve the estate.

The charges preferred against the trustees for receiving goods at an undervalue, and for unreasonable sales of property, are not, in our opinion, substantiated by the evidence; and, as respects the mismanagement of Thomey's estate, whatever blame may rest in some quarters, the trustee of Ridley's estate cannot be made legally responsible for loss thereby occasioned.

The exceptions preferred on these three grounds must, therefore, be disallowed

We think the claim of the Messrs. Ridley to a share of the sum received by the trustees from the Alliance Bank for fitting out the steamers is well-founded, because, although for their personal labour and skill given to third parties beyond what was due by the trustees to the estate, they have a right to receive compensation from those with whom they contract; in the present case the use of the trust premises and staff formed part of the consideration for which the £100 was paid, and to that extent the rule of law to which we have already referred, that a trustee cannot be allowed to make a profit by a trust estate, would make the trustee accountable to the estate, and we therefore direct that a sum of £20 be charged against the trustees on this head.

As regards the only remaining question before us, the amount of remuneration to which the trustees are entitled for their services generally, we cannot in all particulars concur in the conclusion at which the master appears to have arrived, for while we do not disapprove of the allowance of two and one-half per cent. commission on the balance of the £42,458, we think a commission of five per cent. on £27,000 of preferential claims included in that sum much too large.

The labour involved in the settlement of preferential claims was performed almost wholly by the Northern Circuit Court and its officers in determining what were preferential claims, and by the Messrs. Ridley's ordinary staff in liquidating them after the decisions of the court had been made known, and the duty performed by the trustees in this respect could have been little more than seeing that the clerks of the firm supplied the master with any necessary information on the subject of these claims, and that the orders of the court were carried into effect.

But we are also of opinion that the master erred in confining the commission to the proceeds of property sold.

In determining what the trustees are to receive we must be governed by the general Insolvency Act, which directs that they shall be allowed a commission not exceeding five per cent. upon the "*realized value of assets*," a provision which obliges us first, to ascertain what is to be subject to commission, and secondly, the per centage to be imposed. Now, without undertaking to furnish a precise and accurate definition of the meaning of the words "*realized value of assets*," it is enough for the determination of the present case to say that the trustees are entitled, not merely to a commission on the proceeds of goods sold, but also to a commission on property of any description of an ascertained value which by their care and labour they have secured and made available for the benefit of the creditors, and as to which they have incurred responsibility.

In accordance with this principle these trustees would be entitled to commission on goods brought from Rose Blanche for instance, but not to commission on bank shares held under a lien for their full value by third parties, nor on landed or other property with which they had nothing further to do than that the mere title to such property was in them by virtue of the vesting order and was reconveyed by them to the Messrs. Ridley by the deed of composition.

How much of this estate answers the former description we have, by reason of the vagueness of the evidence in many

particulars, found much difficulty in determining; but, feeling it to be desirable that the parties should not be put to the expense and delay of a second reference, we have endeavoured to come to a conclusion upon the materials before us, and, after a careful analysis of the evidence, we are of opinion that the property upon which commission would attach beyond the proceeds of sales may be fairly estimated at £30,000.

As regards the rate of commission, it is by no means an easy task to adjust the compensation which in a case such as the present the trustees should receive. We have no precedent to guide us, as this is the first instance under the new law in which an insolvency has been superseded and the estate only partially realized.

The estate of McLea & Sons, which was referred to on the argument as one in which five per cent. was paid, did not come before the court upon this point. If five per cent. was there allowed it was by the creditors without reference to the judges. That estate, therefore, cannot govern us, even if it did not differ from the present one in being finally wound up.

We do not agree in the contention of Messrs. Ridley's counsel that the allowance to the trustees should be measured by the strict rule of a *quantum meruit*, but we think we should take into account, on the one hand, the standing and experience of the gentlemen employed, the terms of the first agreement between Mr. Prowse, the creditors and Messrs. Ridley, the opinions of the creditors and witnesses as to what would be reasonable and fair under the circumstances, the amount ordinarily paid in the trade for similar work, the extent and value of the services rendered, and the degree of responsibility incurred; and, on the other hand, the very short time of service (not four months), the comparative ease with which, owing to the wholesale character of many of the sales, the work was performed, the large assistance rendered by Messrs. Ridley, their clerks and servants, the large amount upon which commission is to be calculated, the fact that the most troublesome and tedious part of the work (the disposal of remains and the winding up and general distribution of the estate remained undone), the extent to which the trustees availed themselves of legal advice and assistance, and the advantage and comparative immunity they enjoyed in being enabled to appeal to the court in many doubtful matters where the trustee under a composition deed acting upon his own judgment might be compelled to incur grave responsibilities; and, giving full weight

to these several conditions, we are of opinion that a commission of two and one-half per cent. on the proceeds of sales and of a half per cent. upon the remaining £30,000, yielding together the sum of \$4,846 (dollars), would be a just and reasonable remuneration to the trustees of this estate.

Let the accounts be corrected on this footing, and let the parties bear their own costs and a moiety each of the master's costs.

*Mr. Carter, Q. C., and Mr. Whiteway, Q. C., for trustees.*

*Mr. Pinsent, Q. C., and Mr. Winter for Messrs. Ridley.*

# CLAPP, ADMR. TONKIN, v. RENDELL ET AL.

1872, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Landlord and tenant—Lease—Covenant, retrospective operation of—Practice—Demurrer.*

Prior to 1849 the relation of landlord and tenant existed between the plaintiff and defendant. In that year a formal demise was executed, in which the land leased was described by metes and bounds for a term of 50 years from 1846, at a rental of £100 stg. per year. Whilst the land so defined in lease was in occupancy of tenants, and prior to the execution of the lease, a portion was taken by the Crown for street widening, for which the landlord received as compensation £320 stg. The tenants being sued for the rent for a whole year claimed for a proportionate reduction, pursuant to a proviso or covenant in the lease as follows: "If at any time during the term hereby granted any part of the premises hereby leased shall be taken by H. M. Government for the widening of streets and the said landlord be remunerated for the same, a deduction is to be made from the aforesaid rent proportioned to the amount of such remuneration." To this claim or plea the plaintiff replied that the remuneration awarded by the government was for land taken previous to the execution of the lease and the making of the said covenant. To which replication the defendants demurred as setting up no legal answer.

*Held*—(Hoyles, C. J., differing), sustaining the demurrer—The covenant applies to a breach prior to as well as subsequent to the execution of the lease.

THIS was an action of covenant brought to recover a year's rent under a lease dated and executed February 3rd, 1849, whereby Tonkin demised to the defendants certain land and premises situate in St. John's, to hold from the 20th day of October, A. D. 1846, for the term of fifty years from thence

next ensuing, and the rent of one hundred pounds sterling per annum, payable half-yearly.

For a third plea the defendants pleaded as follows: "That in the said deed as part of the alleged covenant is the following proviso, 'provided, nevertheless, and it is hereby agreed, that if at any time *during the term hereby granted* any part of the plantation or premises hereby leased with its appurtenances *shall be required or taken* by Her Majesty's Government or any duly authorized road or street commissioners, for the widening or improvement of streets, and the said Tonkin, his heirs, &c., *be remunerated* for the same, a deduction to be made from the aforesaid rent proportionate to the amount of such remuneration.'" And, the defendants say, that during the said term, that is, since the 20th day of October, A. D. 1846, and during their occupation as tenants under the terms agreed upon in the said deed, and throughout the period for which the rent sought by this action is claimed or became due, part of the said premises so leased and described with metes and bounds in the said deed *was taken* for the purposes aforesaid by persons duly authorized by law in that behalf and the defendants evicted therefrom, of which the lessor had notice, and that for the part so taken and the defendants evicted from the said lessor received from the Government of Newfoundland compensation to the amount of £320 stg. That neither the said lessor in her life time nor the plaintiff as such administrator since her death, although often requested, hath made a deduction or apportionment of the rent aforesaid according to the agreement and proviso as aforesaid, and the plaintiff hath positively refused so to do, and the defendants claim, as a fair deduction in apportionment of the rent now claimed, the sum of twenty pounds stg.

To this plea the plaintiff replied as follows: "To the third plea the plaintiff says that *at no time since the execution of the said deed and the making of the said covenant* has any part of the said premises leased as aforesaid with the appurtenances been taken by the government or commissioners, as aforesaid, for the purposes in the said alleged proviso mentioned or otherwise."

To this replication the defendants demurred as setting up no legal answer to their claim for an apportionment of the rent.

Upon these pleadings but one question has been raised, namely, does the covenant mentioned in the plea apply to an alleged breach occurring before the date and execution of the lease, or is it confined to matters subsequent to such execution?

It is a question which, being to be determined upon the pleadings alone, apart from circumstances, the proof of which, did the question arise upon evidence, might render it easy of solution, I have found to be one of considerable difficulty, but, after careful consideration, I have, not without hesitation, arrived at the conclusion that the covenant does not apply to a prior breach.

My reasons for this opinion are these:—

As will be seen by reference to the authorities presently referred to, it is a clear rule of law that leases, like all other sealed instruments, have effect only from the time of their execution, and that the *habendum*, or that part of the lease which defines the term, estate or interest the lessee is to take, is, so far as it operates to give or grant, prospective from the time of such execution only, although, for the purpose of computation, it may define the term as commencing at a day then past.

It follows that a covenant relating to the estate granted must be prospective also, unless retrospective in its terms or by necessary inference.

In the present case the governing words of the covenant are wholly prospective, and contemplate and refer to something to occur, if at all, after the making of the contract, that is, after the time of the execution of the lease.

The first words of the covenant, "*If, &c.,*" apply not to something positive and known to have already occurred, but to something conjectural and future; so with the words "*shall be required or taken*" and the words "*be remunerated.*" Again, the words "*during the term hereby granted*" can apply only to that part of the fifty years which is to run after the execution of the lease. The word "*term*" standing alone would be equivocal, and might mean either the period of fifty years from 1846 or the years of actual estate or interest coming after the execution of the lease in February, 1849, but the words: "*hereby granted*" can, under the authorities, have but one meaning and can apply only to the latter period.

Before the lease was executed the tenant had *not under it* either interest in or possession of the land. Only when it *was* executed did these begin. How then can a covenant intended by its language to secure and maintain this interest and possession be made, in the absence of express terms or necessary implication from the deed itself, to apply to a time when the tenant had neither to protect?

The legal meaning of the covenant I take to be that *if after the execution of the lease land should be taken, &c.*, and the authorities against its *ex post facto* operation seem to me to be clear and decisive.

In *Wyburn & Duff, 2 B & P.*, a lease of tithes was held not to pass tithes severed before the execution of the lease, though after the commencement of the term of years for which the lease was made. In *Shaw & Kay, 1 Ex.*, a covenant to repair was held not to apply to alleged dilapidations made after the commencement of the term but before the lease was signed, and in this case an old case of *Lewis & Sillars, see Platt on Leases, 288*, in which it was held that a covenant for quiet possession would cover an eviction between the beginning of the term and the execution of the lease was overruled. In *Jarris & Tomkinson* a proviso in a lease of a salt mine, that it should become void if by any accident it became impossible to raise the salt, was held not to relieve the tenant from his objections where the contingency provided against happened between the beginning of the term and the execution of the lease, although it was admitted by the court that it would have had that effect had the lease been executed at the time where the preliminary agreement to the same effect as the lease, and under which the tenant entered into possession, and in the working under which the accident occurred, was entered into; and the same principle has been recognized in several cases—*See 5 Staunton, 548; Cooper & Robinson, 10 M. & W., 2 De Ger; Fisher & Jones, 56.*

But, it is contended, that it was the meaning and intention of the parties shewn (as it of course must be to be effectual) by the deed itself that to this antecedent so-called eviction the covenant should apply; and, if this be so, that intention should undoubtedly govern our decision.

The question then arises, does the lease, so much of it as appears upon the record, contain within itself such sufficient evidence of this intention as must override the express words of the covenant, construed as they ought to be by those rules which the law lays down for the construction of such contracts?

The evidence relied upon is found in that part of the covenant which declares *that if during the term hereby granted any part of the land demised shall be taken, &c.*, and it is argued that the term "*hereby granted*" means within the fifty years, and that part of this identical land described by metes and bounds having been so taken, before the execution of the lease indeed, but within the fifty years and while the tenant was in occupa-

tion, if not under the lease, at all events under the terms therein agreed upon, and such alleged eviction having continued throughout the period for which this rent is claimed, the intention is apparent that the tenant should have either the land demised to him or compensation for its loss, that if it had not been the intention that the land taken should be paid for it would not have been leased, and that as it is not just that rent should be paid for what is not enjoyed, the equity of the case, which the law should if possible follow, is with the tenant.

To this I answer, that I have already shewn that the words "during the term hereby granted" cannot apply to the whole fifty years, but only to that part of the term following the execution of the lease; that the circumstance of the exact description of the land ought not to influence our judgments, because had the description been general the identity of the land leased with that taken could be shewn by parol evidence, and the question would then be exactly what it is at present and subject to the same considerations, does the covenant apply to an eviction prior to the execution of the lease; that the covenant would not be without operation, though restricted to the future; that the fact of the eviction being continued throughout the period during which the rent accrued would not as in ordinary cases give the tenant a right to an apportionment for that time, because the words of the covenant "shall be required and taken" refer only to a precise and definite act as that for which compensation was to be made, and here that act was complete before the rent began to accrue; that while the plaintiff has undoubtedly, as in *Neale and McKenzie, 1 M. & W.*, leased what he could not give, and must, therefore, take the legal consequences of such an act, and while this act of the lessor gives the tenant apparently certain equities, these consequences must be enforced and these equities maintained by their appropriate remedies and not by means of a covenant plainly applicable only to another subject, and that, although the fact of such demise certainly raises a strong inference in favor of the defendant's position, such inference is met by another of great weight, namely, that had it been the intention that the land taken should be allowed for in the rent, effect would have been given to that intention at the time of the execution of the lease, when, the facts being, as appears by the pleadings, fully known to both parties, it would have been most natural to have reduced the rent at once, instead of leaving the matter for future adjustment, since, by postponing the

reduction, the parties to the lease not only exposed themselves to the chance of their intentions being accidentally defeated, but also placed themselves in the singular position, the landlord, of demising land which both he and the tenant knew was not to be enjoyed, and, the tenant, of covenanting to pay an amount of rent which both he and his lessor knew was not to be exacted.

Amid this conflict of inferences, and under the pressure of the authorities I have cited, I can only say that the evidence of a contrary intention appearing in the lease is, in my opinion, insufficient to justify a departure from the plain legal and grammatical construction of the covenant and a substitution therein of words of a different meaning, and that, in my judgment, the demurrer should be overruled.

If it really was the intention that the rent should be reduced in consequences of the taking of part of the land before the execution of the lease, the tenant is not without remedy, probably by law, certainly in equity, where, the court being less trammelled by technical rules and having all the facts fully before them, could be better enabled than they are at present to do justice between the contending parties.

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HON. MR. JUSTICE ROBINSON :

The question to be determined in this case arises upon a demurrer to the replication for not being an answer to the plea, but both parties have addressed themselves to the substantial matter of law at issue between them rather than to the technical pleading, and I am willing to follow their lead with a view to determine the controversy.

The following summary of facts will suffice to make my judgment comprehensible.

The relation of landlord and tenant appears to have existed between Lady Tonkin and the defendants prior and up to the 3rd Feb., 1849, in reference to the land described in the lease of that date. On the said 3rd Feb., 1849, a formal demise under seal was executed by the said parties, in which the land intended to be thereby leased was described by metes and bounds, and was to be held for fifty years from 20th October, 1846, at the annual rent of £100 stg.

Whilst the land so defined was in the occupancy of the defendants, and prior to the execution of the said lease, a portion of it was taken by the Crown (under the provisions of a statute)

and appropriated to widen a street, for which portion so taken the landlord received as compensation the sum of £320 stg.

The tenants, being now sued by the representative of Lady Tonkin for the whole rent for a year, claim to be entitled to a proportionate reduction, pursuant to the following proviso in the lease:—"If at any time during the term hereby granted any part of the plantation or premises hereby leased shall be required or taken by H. M. Government for the widening of the streets, and the said landlord be remunerated for the same, a deduction is to be made from the aforesaid rent, proportioned to the amount of such remuneration."

In answer to this claim of the tenants the landlord, admitting that the land was so taken and remuneration so received, insists upon a right, nevertheless, to make the tenants pay their full rent for the diminished quantity of land, upon the technical ground that the lease speaks only from its delivery in 1849, and that the words "shall be taken," being in the future tense, cannot grammatically refer to the land taken *before* such delivery, and for these positions Mr. Pinsent and Mr. Whiteway cited *Wybard vs. Tuck*, *Shaw vs. Key*, *Jervis vs. Tomlinson*, *Bacon's Abridgment*, and other authorities. In some of them the language used seems to support their view, but it is only an apparent support which a close examination will shew to be inapplicable to the case under our consideration.

The position assumed by the plaintiff is, under the circumstances, startling, but, however inequitable such a construction as that for which he contends would appear to be, I should conform to it if I felt convinced that it was clear law, for it would be mischievous and unwarrantable to infringe a general rule for the purpose of meeting the exigencies of a particular case; but I am of opinion that the dicta relied upon do not apply to or govern the question under our consideration that in this, as in most other instances, law is not dissociated from justice and that the defendants are here entitled to judgment.

In most of the authorities qualified language is used to the effect that in the *habendum* in leases the word "term" serves *only* to mark the duration of time and not the interest or quantity of land granted, and that the covenants in a lease operate prospectively and not retrospectively, because a deed takes effect only from its delivery; but an examination of those authorities will show that the judges therein were interpreting isolated covenants, unaided by precedent or subsequent explanation, and were necessarily restricted to the words used in

such covenants; the language they used in disposing of each case was strictly *secundum subjectam materiam*, and such as was adequate to determine the questions there raised in relation to the circumstances there existing.

If the dicta in those authorities were to be adopted as abstract truths they would conflict with general principles of admitted application, but if they were read—as doubtless they were delivered—solely with reference to the matter before them, they will be found not inconsistent with general principles and yet sufficient for the particular case.

In the first place it is an error to state—as a general rule—that the word “term” is solely used to express duration of time, because, where the context explains the intention, it has been ruled again and again that “term” will mean “not merely the time but the interest conferred.”—*1 Step. Com. 292, Evans vs. Vaughan, 6 D. & R.*

Certainly, a deed only takes effect after it has been delivered, because until then it is not the completed expression of the contracting parties; just as an Act of Parliament only takes effect from the Queen’s assent, but, when once completed, both deed and act may and often does operate retrospectively.

It is a fundamental principle of universal application that in the interpretation of covenants the first object is to ascertain from the whole instrument the real intention of the parties, and to expound such covenant in relation to such intention.

The language of Lord Chief Baron Gilbert, in *4 Ba. Ab. 817*, is as follows: “The law will rather do violence to their words than break through the intention of the parties; a lease for years is no other than a contract for the possession and profits of the land on the one side, and a recompence of rent on the other, and, if the words used are sufficient to prove such a contract, the law calls in the intention of the parties and models the words accordingly.”

In the law of landlord and tenant it is a dogma that rent—being a return for the use and profit of the land demised,—where the tenant is deprived of the use of any portion of such land by being evicted under title paramount, a proportionate reduction of rent follows as a consequence of common law irrespective of any proviso.

Now, if we apply the foregoing principles to the facts of the present case and search for the true meaning of the lease from its whole contents, we shall see that in the earlier portion of it

there is a clause which necessarily refers to the proviso in the latter portion and furnishes a key to unlock the meaning of both portions; thus, in the "premises," a grant of the whole land defined by boundaries was created by the words "doth demise and lease," which grant thereby vested in the tenants an estate (for the term or period of fifty years afterwards, limited); the proviso then stated that if during the "*said term*" (meaning of fifty years) any of the "*said land*" (meaning that previously defined and conveyed) should be taken a reduction in the rent shall be made, &c., &c. Thus, it is plain that if "*term*" means duration, the land has been taken within the fifty years. If "*term*" means quantity of estate, the portion taken was part of "*the said land*" to which the proviso expressly referred, and from either point of view the tenants are entitled to a reduction.

If such was not the intention of Lady Tonkin it would follow that she meditated the grant of land which she knew she did not possess and the reservation of rent which she knew could not be earned out of it, a proceeding which Lord Tenterden, in *Evans vs. Vaughan*, characterized as fraudulent and a fraud which would have been as unavailing and perilous as it would have been unworthy, for she would have incurred the risk of her whole rent being suspended (*Neale vs. McKenzie, 1 M. & W.*) or having the rent apportioned by operation of law. — *Tomlinson v. Day, 2 B. & B.*; *Neale v. McKenzie, Q. C. M. & R.*

I believe, however, that Lady Tonkin neither designed nor committed any fraud, but in defining the whole land demised by metes and bounds as it originally stood, and then, making the proviso refer to "*said land*," she intended to provide for past as well as future appropriations, and protected the tenants in either contingency

It was asked, how can the future words in the proviso "shall be taken" relate to land that had already been taken in 1849? The answer is, that the antecedent words in the lease modify them and shew that the parties intended the proviso to be co-existent with the term and to operate from 20th October, 1846.

It was stated at the bar, in argument, that the relation of principal and agent existed for many years between Lady Tonkin and the defendants, and that such defendants were and are well aware of the true meaning of each other that the whole rent should be paid notwithstanding the whole land was not enjoyed by the tenants. It is possible that such may be the case, but I have no evidence of it and have no authority to

go outside of the four corners of the deed to discover their meaning. If the language used is a mistake, proceedings may be taken in a Court of Equity to reform the instrument, but those proceedings cannot be imported into the present question.

In my opinion the demurrer should be allowed and judgment entered for the defendants.

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HON. MR. JUSTICE HAYWARD:

This action is taken to recover from the defendants the sum of £100 stg. for one year's rent, alleged to be due from them to the plaintiff, as administrator of Eliza Jane Tonkin, for premises described by metes and bounds in a lease between them—part of which premises was occupied by the defendants during the time for which the rent is sought to be recovered, but another part had been taken possession of by the Government and appropriated to public purposes, and for which the said E. J. T. had been remunerated to the extent of £320 stg.

A lease was extended between the said E. J. T. and the defendants on the 3rd February, 1849, by which she demised the whole of the land therein mentioned to them for the term of fifty years from the 20th day of October, 1846, at the annual rent of £100 stg., and in that lease it was provided to this effect: "That if at any time during the *term hereby granted* any part of the premises *hereby leased shall be taken* by the Government for widening the streets, and the said E. J. T. be remunerated for the same, a deduction is to be made from the aforesaid rent proportioned to the amount of remuneration."

It appears that the defendants went into possession of the whole of the property *thereby leased* in October, 1846, and between that time and the execution of the lease, the Government took possession of a part, from which they evicted the defendants and for which they paid the said E. J. T. the sum of £320 stg. as remuneration for her loss.

The case came before us upon demurrer, in support of which it was contended by Mr. Carter, Q. C., for defendants, that an apportionment of rent was claimable by the defendants under the proviso in the lease; that the land demised was identified by metes and bounds; that the "premises hereby leased" referred to the whole premises so described, and not to that part only that remained in possession of the defendants at the time of executing the lease; and that the instrument should be taken as a whole and the intention of the parties gathered

therefrom, and that under all the circumstances of the case the plain meaning was that the lease should commence to operate from the commencement of the term in computation of time and not from the time of its execution.

Mr. Whiteway, Q.C., and Mr. Pinsent, Q.C., for the plaintiffs, contended, on the other hand, that under the terms of the lease the defendants were not entitled to any reduction of the rent agreed upon, inasmuch as the land, although taken by the Government whilst the defendants were in possession and during the time specified in the lease, was so taken before its execution in 1849, and, therefore, that the proviso as to any part of the land being taken was intended only to have a prospective operation, as appears by the words "if at any time *during the term hereby granted* any part of the premises *hereby leased shall be taken*, &c., and could not be construed to mean land which *had been* taken before the lease was executed—the words "*shall be*" not having a retrospective operation, and to sustain this position several authorities were cited.

Since the case came up for hearing I have given consideration to the arguments of counsel and to the authorities in support of the position maintained by them on both sides.

Where nothing appears in a deed to control or alter the legal effect of the words in the *habendum*, and where there is nothing to show that a contrary meaning was intended, it will operate as a grant only from the time of its execution, and, in this case, if it would only so operate, the plaintiff would be entitled to judgment, as there was no eviction afterwards. This rule of law is clear, but the cases cited to show that we should apply it in this instance have failed to convince me, as they were decided under the different circumstances attending each, and none of them are, in my opinion, in point with the present.

The word *term* in a deed may be read as *time* if it appear to have been the intention of the parties, and will, therefore, refer to the commencement of the holding.

The proviso in question contains these words, "If at any time *during the term hereby granted* any part of the *premises hereby leased shall be taken*," &c. From these words principally and the circumstances disclosed in the pleadings I have to ascertain the meaning of the parties, and whilst I agree with the plaintiff that the words *term hereby granted* and the words *shall be* are strongly in favor of his position, I have to consider also the meaning of the words *premises hereby leased* with reference to the circumstances of the case, and I ask what premises are

*hereby leased?* The answer is, the premises that are described by metes and bounds in the lease—the same that the defendants went into possession of in October, 1846, from part of which they have since been evicted by the authority mentioned in the proviso (the government), and for which the plaintiff received as remuneration the sum of £320 stg., and the same premises for which the defendants are now called upon to pay the sum of £100 stg. a year as rent, although they are deprived of a part of that premises *hereby leased* and described in the deed.

From this statement of facts I have to ask myself was it the intention of the parties that the term mentioned in the proviso should have reference to the time of the original taking or that of the execution of the lease, and, notwithstanding the local bearing of some of the expressions in the deed in favor of the plaintiff's position, when I consider the foregoing strong points in favor of the defendants and the rule of law that a deed must be construed so as to give effect to the real intention of the parties, I can arrive at no other conclusion than that the intention was that the lease should operate from the 20th October, 1846, and, therefore, that an eviction between that time and the execution of the deed entitles the defendants to an apportionment of rent, and I am of opinion that the defendants are entitled to judgment accordingly.

*Mr. Whitmay, Q. C., and Mr. Pinsent, Q. C., for plaintiffs.*

*Mr. Carter, Q. C., for defendants.*

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1872, *July*. HON. MR. JUSTICE ROBINSON.

*Insolvency—Fraud—False pretences—“Probable expectation of being able to pay”—  
Insolvent vexatiously defending suit.*

To convict a party under the Insolvency law and to sentence him to imprisonment, his crime must be proved so clearly as to exclude all reasonable doubt of his innocence,

It is not every default in a debtor to pay his debts that will render him a criminal in the eye of the law and amenable to penal imprisonment.

If creditors think proper to encourage debtors in recklessly running into debt, the Court will not punish the debtor, who is guilty of no other misconduct than failing to pay.

A debtor who merely gives bail in a suit to release his person from arrest preparatory to his petitioning for a declaration of insolvency, whereby all his creditors may be equally benefitted, cannot be said “vexatiously” to defend a suit within the meaning of the Act.

THIS matter came before me on the petition of Mr. George E. Wilson to be declared insolvent. The petitioner is manager of a Theatrical troupe which visited St. John’s last June; his company consisted of twelve actors and actresses, for whose salaries and expenses he was liable. The petitioner had, two years ago, been in this colony in co-partnership with a Mr. Clarke, and on their voyage hence were wrecked upon the coast of P. E. Island, and lost property in the disaster. After the shipwreck Clarke repudiated his liabilities to various parties with whom he and petitioners had dealings, and, previous to petitioner visiting Newfoundland upon the present occasion, he assumed all those liabilities, and induced what he believed to be a strong and attractive dramatic corps to accompany him.

The debts which petitioner thus assumed amounted to about \$6,500, of which he alleges he has paid off \$1,039.

The debts embraced in his schedule, contracted by petitioner alone, amount to about \$3,500, and are principally for salaries of his company, the cost of the theatre, and the fitting up of the building, whilst his assets consist of his wearing apparel and nothing more.

The rent and gas of the Rink, wherein petitioner held his theatrical establishments, amounted to £12 10s. a week, the salary of one actress alone—Miss Boyd—was £7 10s. a week beside her board and lodging, and the aggregate expense of the theatre each night amounted to £13 15s.

Petitioner had been about ten weeks acting in St. John’s during the present season, in which his total receipts were

\$2,752 and his expenses were \$2,673—the difference being expended by petitioner in his own board. The disbursements are set out in detail and have not been questioned.

He states that he commenced the season with excellent success and bright prospects, but eventually he fell into difficulties through defects in the building, and the consequent waning of popularity.

There can be no doubt of the petitioner's insolvency, which is admitted by his opposing creditors, but Mr. Carter, Q.C., and Mr. Emerson strongly contend, on behalf of some of his creditors, that the petitioner has exposed himself to the penalties of the insolvent law by reason of fraudulent conduct, principally in obtaining lumber from Messrs Boyd, chairs from Mr. Barron, and printing and money from Mr. Winton and Mr. Squarry, upon "false pretences" and without having a "probable or reasonable expectation" of being able to pay for them.

Before I can accede to the application to convict the petitioner of fraud under the insolvent law and to sentence him to imprisonment, I must have his crime proved so clearly as to exclude all reasonable doubt, for neither under the Insolvent nor any other Act is a man to be condemned to punishment until his guilt shall be proven.

Whether in strict morality one is justified under any circumstances in incurring a debt which he cannot discharge, is a question I am not here required to decide, but certainly it is not every default in a debtor to pay his debts that will render him a criminal in the eye of the law and amenable to penal imprisonment.

Whether this petitioner has been shewn to have obtained goods "under false pretences" or "without a reasonable expectation of being able to pay for them" must depend upon the evidence and the circumstances of this case.

As regards the express evidence it is uncontradicted upon this point. The petitioner swears that his creditors were aware of his condition and calling; that they knew he was an itinerant comedian about to try his luck before a St. John's audience; that he made no pretence of having any means beyond those he might earn from night to night, and that he asked those creditors to trust him for payment; that with Mr. Winton and Mr. Squarry he had had dealings when he was last in the colony; that the former had lent him money and continued to allow the *Morning Chronicle* press to be employed in the thea-

trical printing; that Mr. Squarry also knew the petitioner possessed no capital, for Squarry had become security for the hire of a temporary theatre in Harbor Grace on petitioner's former visit, whilst to Mr. Boyd he explained his circumstances and his need of assistance to fit up the Rink, asking him for lumber, which Mr. Boyd supplied upon credit.

Both Mr. Winton and Mr. Boyd were present at the examination, and neither was tendered as a witness to contradict the petitioner. I am, therefore, bound to accept his statements as true and to hold that there is no express evidence of any deception or misrepresentation having been used by him.

As regards the circumstances from which I am asked to infer the guilt of the petitioner; they are as follows: find gentlemen freely giving their property and labor upon credit to one who is not a resident in the country, who had not and did not pretend to have any capital beyond his dress and theatrical attainments, and who was known to them only as a travelling comedian—a profession which every man of experience knows to be precarious in its profits and extravagant in its requirements, dependant for its success upon popular tastes that are sometimes capricious and oftentimes exacting.

Reference was made by Mr. Carter that if a fisherman is guilty of fraud he will be punished—and so he should be, but a fisherman has never been deemed guilty of fraud for taking supplies upon the chance of “a voyage” that is still in the sea, simply because the supplier knows the risk he runs, and the play-actor who gets credit upon the chances of popular favor and dramatic success is trusted upon a security hardly more certain. Under such circumstances it would be gross injustice to convict the petitioner.

It is much to be regretted that creditors who befriended the petitioner and acted with liberality towards him, as those here seem at first to have done, should lose their money, but if people jeopardize their property in such hazardous ventures they have no one to blame but themselves.

In a somewhat similar case determined in England a short time since, the judge in Bankruptcy declared that if creditors thought proper to encourage debtors in recklessly running into debt the Court would not punish the debtor who was guilty of no other misconduct than failing to pay.

Mr. Carter urged vigorously that his client may have been seduced into trusting the petitioner upon the faith of some scenery he had in use, which he now states belonged to one Fanning.

The evidence by no means satisfies me that the scenery did not and does not belong to Fanning; it is sworn that it does, and nothing is proved to the contrary, but if it were otherwise I should doubt that Mr. Boyd, or Mr. Winton, or Mr. Barron, were in the smallest degree influenced in their advances by the consideration of property (even if they knew of its existence) that for any but dramatic purposes would be useless trumpery.

I am certainly of opinion that in the distribution of the large sum received by the petitioner during the season, a more equal division amongst all his creditors might and ought to have been made, and if that reasonable course had been adopted possibly the present opposition would have been prevented, but with this exercise of discretion or indiscretion I have nothing to do. I have only to see whether legal fraud has been proved, and I am bound to say that neither the evidence nor the circumstances of this case justify me in adjudicating the petitioner to be guilty of such fraud. I must, therefore, declare him insolvent and order that his bailbond be delivered up to be cancelled.

I have not overlooked the contention by Mr. Emerson that the insolvent has brought himself under the penal clause of the insolvent law by giving bail in Quarry's action in order to effect his release from imprisonment, thereby causing Quarry expense by "vexatiously defending the suit," I am of opinion that a debtor who merely gives bail to release his person from arrest, preparatory to his petitioning for a declaration of insolvency whereby all his creditors may be equally benefitted, cannot be said "vexatiously" to defend a suit within the meaning of the Act.

*Mr. McNeily* for petitioner.

*Mr. Carter, Q. C., and Mr. Whiteway, Q. C., and Mr. Emerson and Mr. Winter* for sundry creditors opposing.

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1872, July. HON. SIR H. HOYLES, C. J.

*Shipping—Salvage—Award—Apportionment.*

A sealing schooner of fifty-seven tons, with a crew of twenty-four men, while on her way to prosecute a sealing voyage, fell in with a sailing vessel on the south coast of Newfoundland, abandoned, drifting about in a string of ice, about sixty miles from land, and successfully brought her into port after five days, with much labor. The value of the property salvaged was \$5,800. In a suit instituted for salvage the Court awarded a sum amounting to four-sevenths of the appraised value, and directed that the award be apportioned amongst the owner and master and crew of the salvaging schooner upon the principle upon which the proceeds of the sealing voyage would be distributed, with the exception that the men who went on board the wreck and navigated her to port, having incurred greater risk than the rest of the crew, should receive from the crew's whole salvage, \$20 to the mate and each of the men \$10, in addition to their other shares.

IN this case a claim is preferred for salvage on fourteen hundred and seventy-four boxes of raisins, part of the cargo of this derelict, under the following circumstances:—

On the fourth of April last the schooner *A. T. Stone*, of Harbor Grace, of the burden of fifty-seven tons, and having a sealing crew of twenty-four men, while on her way to prosecute a sealing voyage in the Gulf of St. Lawrence, fell in with a vessel apparently abandoned, drifting about in a string of ice about sixty or seventy miles to the southward of Cape Chapeau Rouge.

With some trouble and a slight risk of life some of the crew of the *A. T. Stone* succeeded in boarding her, and found her to be a schooner of about one hundred tons burthen, bearing the name of *Caroline Brown* on her stern.

Upon further examination they found that her hatches were open and part of her cargo (which consisted of boxes of raisins) was scattered about the deck, whence they concluded that she had been previously boarded by other parties. She had been stripped of sails, rigging and provisions; her masts and anchors were gone; she had several feet of water in her hold arising from a continuous leak, and she was apparently in such a disabled and helpless condition as to render the task of saving her at least exceedingly difficult.

The attention of the salvors was first directed to the leak, and, finding that by labor and attention they could keep the wreck afloat, they took her in charge, lightened her by transferring part of her cargo to the *A. T. Stone*, rigged up a jury-mast with materials from their own vessel, made a towline fast

to her, put a crew of eight men on board, and, being favored with moderate weather, succeeded after much labor, with some risk to their own lives and some damage to their own vessel, in bringing the wreck into St. John's on the 9th of April.

On her arrival, being arrested at the suit of the Crown as droits of the Admiralty, a claim to the part of the cargo above-mentioned was preferred by the Mercantile Mutual Insurance Comp'y of New York, who paid into court the sum of \$1,091.65 in discharge of salvage, but this tender being rejected by the salvors, who claimed the whole or at least three-fourths of the property saved, the cause proceeded through the usual stages, and on the 17th of June instant came to a hearing.

After the best consideration I have been enabled to give this case, I am of opinion that taking the tender at what it was intended to be, but which it is not, a tender of a moiety is somewhat insufficient.

While I admit that, except under very special circumstances, the court does not as a rule allow salvors, even in derelict cases, more than a moiety for the property saved, and not nearly that proportion when the property saved is of large value, I hold that the entire abandonment by the *A. T. Stone* of the sealing voyage, in order that the *Caroline Brown* might be recovered, brings the present case within the exception.

Then, it is true on the part of the respondents, the opinion of a sealing master of very great experience, that the prospects of the *A. T. Stone* making a successful voyage were not encouraging; but it is clear that the master and men thought otherwise, as, when they fell in with the *Caroline Brown*, they were proceeding to their field labor, and, as in saving the wreck they were working for others as well as themselves, they are, I think, entitled to the benefit of the doubt, and I may fairly presume that had they continued their voyage they would have secured at least a moderate trip, and in that view a moiety of this property would be rather a scanty compensation for their services. On the other hand, to give three-fourths would, after the expenses were paid, leave too little for owners, whose interests are also entitled to just consideration. Upon the whole, having regard to this special sacrifice by the salvors, to the comparatively small value of the property saved—about £1,459 in all, to the certainty, humanly speaking, of the speedy and entire loss of the *Caroline Brown* had she not then been fallen in with, to the fact that but for the unusual number of her own crew the *A. T. Stone* could not have saved her at all, to the risk

incurred by those of the salvors who stayed on board the wreck, to the damage done to the *A. T. Stone* by collision with her tow, and to the labour and fatigue undergone by the salvors generally in the course of the enterprise, I am of opinion that an award of four-sevenths of the appraised value, less duty, will meet the justice of the case.

The respondents, having received the property claimed, must, of course, refund to the salvors the monies advanced by them to the Customs, and these sums, making in all the sum of \$1,576, together with a rateable proportion with the other owners of ship and cargo of the costs of suit, including in these the costs of the Crown and the towage and pilotage paid or assumed by the Marshal, I order to be paid by the respondents or their sureties to the salvors.

Upon the subject of apportionment of the salvage, a matter which has also been submitted to me, I am of opinion that the salvage of the *Caroline Brown*, having been substituted by the consent of all parties for the sealing voyage without any stipulation for a change in the proportions of remuneration to those concerned, the principle upon which the proceeds of the sealing voyage would be distributed must be applied here, with this exception, that the men who continued on board the wreck, having incurred greater risk than the rest of the crew, are to receive from the crew's half of the whole salvage that may be received—the mate twenty dollars and each of the men ten dollars, in addition to their other shares.

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1872, July. HON. SIR HUGH HOYLES, C. J.

*Shipping—Salvage—Award—Apportionment—Appropriation by Salvors of property salvaged—Costs—Joint service—Two sets of salvors.*

A sealing schooner of one hundred tons with a crew of fifty men while prosecuting a sealing voyage, fell in with a sailing vessel of one hundred tons, on the north-east coast of Newfoundland, abandoned, tossing about in the trough of the sea, about eighty miles from St. John's. A portion of the crew of the sealing schooner with great toil and considerable risk of life, succeeded in boarding her and navigating her to port after five days, having experienced very tempestuous weather on the voyage. The value of the property salvaged was appraised at \$13,897. In a suit instituted for salvage the Court awarded a sum of \$4,000, and directed that the award be apportioned amongst the owner, master and crew of the salvaging schooner upon the principle upon which the proceeds of the sealing voyage would be distributed, with the exception that the men who went on board the wreck and navigated her to port, having incurred greater risk than the rest of the crew, should receive from the crew's whole share of salvage, as follows: \$30 to the sealer in charge of the salvaging crew and \$20 to each of the others.

A charge of wrongfully appropriating to their own use a quantity of ships' stores having been made against the salvors, the Court ordered that the extra sums awarded them be not paid until they had cleared themselves of the charge.

When a joint salvage service has been performed and the salvors engage separate proctors the Court will only allow costs against the respondents for one set of salvors.

THIS was a cause of salvage, civil and maritime. By the pleadings and proofs exhibited in the cause, it appears that the above named vessel was a schooner of 100 tons burthen, belonging to Harbor Grace, and that on Monday the 18th day of March last, she left that port with a cargo of dry cod-fish bound to Lisbon. When the *Clara* left Harbor Grace the wind was fair, but in the afternoon the *Clara* being then between Torbay and St. John's, the wind came ahead, and as the weather looked threatening, and as the ice was but a short distance off and was coming in rapidly upon the land, the captain (Webber) thought it best to return to Harbor Grace and endeavored to do so, but being intercepted by the ice, he was obliged to run into Torbay, on the south-side of which he came to anchor.

About nine o'clock, p. m., the wind having shifted to the north-west and blowing very heavily, the ice with which the bay was then filled pressed upon the *Clara*, causing her to drag her anchors and driving her upon the rocks where she struck repeatedly, and the captain and crew fearing that she would speedily break up, abandoned her to her fate and with some difficulty got on shore. The next morning the *Clara* was not

to be seen, and it was supposed by her crew that she had drifted to sea and foundered in the night, but on the following Wednesday she was fallen in with about eighty or a hundred miles to the south-east of St. John's by the *Penguin*, a sealing schooner of Harbor Grace, of about one hundred tons, and with a crew of fifty men, engaged in the prosecution of a sealing voyage. When first sighted from the *Penguin*, the *Clara* was about five or six miles off, and was computed two or three miles from the weather edge of the ice in which the *Penguin* lay, and upon which the *Clara* was rapidly drifting.

It was evident to those on board the *Penguin* that the *Clara* was abandoned as she was tossing about in the trough of the sea, which at times broke over her, and the master of the *Penguin* in the hope of recovering her, sent out to her relief sixteen men of his own crew, who, dragging a punt with them over the ice, which is deposed to have been in a very broken and dangerous condition for travelling on, succeeded, but not without great toil and considerable risk to their own lives in boarding her.

Upon examination they found that the *Clara's* fore staysail was carried away and that her main staysail had burst; that both chains were hanging over the bows. That to one of the chains an anchor was suspended, which, there being but a few feet of that chain out, beat heavily against the bows as the vessel rose and fell with the waves, from the other chain, of which there were several fathoms out, the stock of a broken anchor hung.

With these exceptions the *Clara* was apparently uninjured and she made very little water, but it was afterwards discovered that her keel had been broken and some of her planks injured from her striking as was supposed on the rocks at Torbay.

For a day or two the whole sixteen men were confined to the *Clara* by the weather, but on Friday the 22nd, they were enabled to communicate with the *Penguin*, when seven returned to their own ship, the remaining nine men being directed by the master of the *Penguin* to navigate the *Clara* to St. John's.

On the Sunday following both vessels got clear of the ice, in which they appear to have been jammed from the Wednesday preceding, the *Penguin* resuming her sealing voyage, and the *Clara* making the best of her way to St. John's, where after experiencing very tempestuous weather, she arrived on the afternoon of Tuesday the 26th of March. It appears from the

affidavits of the salvors that the *Clara*, not being sheathed, was while in the ice exposed at times to much danger of foundering.

Upon the facts, of which the foregoing statement is an outline, Mr. Whiteway for the owners of ship and cargo contended, that most of the elements which are considered necessary to sustain a claim for large salvage were here wanting, and that a sum of three or four hundred pounds would be a sufficient compensation for the services rendered by the *Penguin*. He also contended that the claims of the men who were put on board the *Clara* were materially lessened if not altogether destroyed by the fact of their having as was alleged and as there was evidence to shew, appropriated to their own use a considerable quantity of the ships' stores, and much of the captain's clothing.

Messrs. Carter and Kent, for the salvors, thought their clients entitled to a decree for one-half of the property saved, and they prayed that the consideration of the charge of plundering the stores and clothing, should be postponed until the salvors should have had an opportunity of rebutting the charge, it having been preferred only after they had left St. John's for the cod-fishery.

In determining the amount to be awarded for salvage services, several considerations have to be taken into account, the principal of which are the value of the property saved, and the danger to which it was exposed; the risk of life to the salvors, the value of the property necessarily engaged in saving, and the time, skill and labor bestowed in the service.—*W. & B. 117.*

In the present case it can hardly be contended that much time, labor or skill was employed in saving the *Clara*, that the *Penguin* was herself exposed to danger, or put to trouble, or sustained injury, or that her crew with the exception of the sixteen men, who certainly rendered meritorious service, ran any risk of life. After two or three days delay at the most, she continued her voyage, she was not at any time engaged in towing, and the men she spared from her crew when once on board the *Clara*, did only the work of skilled seamen and sealers in bringing the *Clara* into port.

On the other hand, had the *Penguin* fallen in subsequently with seals, the absence of the men sent on board the *Clara* would have seriously diminished her catch, and the risk of this loss was incurred to render service to the *Clara*. None but a craft of size and power, and having a large crew of men accustomed to brave the perils of the ice-travel, could have

been in a position under the circumstances, and at that season, to give the assistance that was here rendered; and the labor bestowed, though occupying no great length of time, nor in the abstract very onerous, was the means of restoring to the owners a large amount of valuable property, which but for the *Penguin* and her crew would inevitably have perished. Weighing carefully these considerations, following as closely as possible the awards of the High Court of Admiralty in cases nearly analogous, *see Pritchard, Derelict and Salvage award*) and recollecting that in this country, with what propriety or from what necessity, I do not stay to inquire, one half is oftentimes allotted to salvors of property wrecked on the shore, I am of opinion that of the appraised values of the ship and cargo making together thirteen thousand eight hundred and ninety-seven dollars, four thousand dollars would be a sum which, while liberally compensating the salvors for their services, and promoting the interests of trade and navigation by encouraging others in efforts to save life and property, would not be unreasonably large for the owners of ship and cargo to contribute ratably in return for what has been preserved to them.

The apportionment of this sum should, I think, be as follows:

From the whole amount, thirty dollars to Michael Farrell, and twenty dollars to each of the other fifteen men who boarded the *Clara* should first be paid, and the remainder should be distributed amongst the owners, master and crew of the *Penguin*, in like manner as the proceeds of the sealing voyage would be divided, conformably to the principle laid down in the *Caroline Brown*, that the proportions agreed to by all parties interested as those which should govern the ordinary results of the voyage, should also, with a reasonable exception in favor of any special services rendered by any one of the crew, govern its accidental profits.

The costs will follow the event, with this exception, that as this was a joint service and ought to have been prosecuted as a joint suit, the several claimants employing separate proctors, as advocates only, where their claims were conflicting, the costs of the second set of salvors' pleadings ought not to fall on the respondents except in so far as these were absolutely necessary.

It remains that I should dispose (for the present at least) of the charge of spoilation.

This charge is that the men placed on board the *Clara* wrongfully appropriated to their own use, a quantity of provisions

and ships' stores, to the amount of over one hundred pounds worth, and clothes belonging to the captain, Webber, of the value of twelve pounds and upwards. The evidence in support of the charge so far is that the property in question was on board when the vessel was abandoned at Torbay, and was not on board when she was restored to the owner upon bail, and that clothes identified by the captain as his own were seen on one of the *Penguin's* men, and that a pair of boots, the captain's property, was admitted to have been taken by another of the men, and was paid for in consequence.

It is a principle which the Court of Admiralty strictly enforces that, except that they are entitled to maintenance while in charge of a ship, from her stores, salvors are bound scrupulously to respect the rights of owners in the property for the salvage of which they claim, and that when they fail in this respect they forfeit either the whole or part of their salvage-reward, according as their offence has been more or less flagrant, and to this principle I am bound to conform.

In the present case, however, the parties charged have not been heard in their own defence, and I am not therefore prepared to say whether the principle is or is not to apply to them; but to ensure justice being done in this particular, I shall direct that the extra sums awarded to these sixteen men be not paid to their proctors, but be paid into the Registry, until they shall have cleared themselves of this charge or until I shall otherwise order.

Let a decree be entered in accordance with these directions.

*Messrs. Carter, Q. C., and R. J. Kent* for salvors.

*Mr. Whiteway, Q. C.,* for owners.

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1872, July. HON. MR. JUSTICE HAYWARD.

*Shipping—Sealing voyage—Desertion and abandonment of voyage by portion of crew  
—Right of deserters to participate in subsequent earnings of voyage—  
Expenditure by crew for labor sculpting a whale, liability of  
owner of vessel to contribute.*

The plaintiff was one of a crew of seventeen men on board a small schooner engaged in the prosecution of a sealing voyage from the first day of March. Having become jammed in the ice and drifting into Bay St. George in Newfoundland, nine of the crew, with the assent of the master, left the vessel, abandoned the voyage and proceeded to their homes. Some few days after the vessel, being released from the ice jam, fell in with a dead whale afloat on the water, which was towed into port, sculpted, barrelled and conveyed to St. John's, and sold for \$670 to the defendant. It was admitted that the defendant (the owner of the schooner) was entitled to half the proceeds of the whale; but it was contended by the defendant, on the part of the crew who had abandoned the voyage, that they also were entitled to participate in the profits of the whale, and that the plaintiff was not entitled to one-ninth of one-half as claimed by him; and further, that a sum of \$40, paid for sculpting the whale, being labor which the crew were able and bound to perform, should be charged altogether to their share.

*Held*—That the members of the crew who left the vessel and abandoned the voyage were not entitled to participate in her subsequent earnings.

*Held*—The work of sculpting the whale being work with which the crew were not acquainted, and the owner of the vessel having participated in the profits of the work for which the \$40 was paid, the latter must be held liable for half of the expenditure.

In this action the plaintiff seeks to recover the sum of £10 4s. 1d. for his share of a whale, and £1 1s. for his share of seals taken by the crew of the schooner *Susan* last spring and afterwards purchased by the defendant.

The plaintiff's case was that he, with a crew of seventeen other men, left St. John's on the 1st day of March last, bound on a voyage to the seal-fishery in the Gulf of St. Lawrence, having on board the usual supply of provisions; that they arrived in the Gulf, but only caught about forty seals, and, in the month of April, got jammed in the ice and drifted into St. George's Bay, and, on the 17th or 19th day of that month, nine of the crew left the vessel and proceeded to their homes at St. John's.

That the other nine men, of whom the plaintiff was one, remained by the vessel, and in less time than a week she was released, but, seeing no prospect of obtaining seals, they, after two or three days' search, determined to proceed home in the

vessel, and on their way they put into Codroy and Channel; afterwards, on the 29th day of April, about twenty miles off Burgeo, they had the good fortune to meet with a whale lying dead in the water, which they took in tow, and after much trouble they arrived in Burgeo with their prize; but not being able to dispose of it there to advantage, they employed a crew who understood the sculping of it, and with their assistance they had it cut up and put on board the vessel; they then left and arrived at St. John's on the 16th May, and disposed of the whale to the defendant for £25 per ton, in the whole £167 10s.

Of this amount it is admitted that the one-half belongs to the owner of the vessel, and the present plaintiff claims the one-ninth of the other half, whilst the nine men who left the vessel claim an equal share with those who prosecuted the voyage and had the good luck to secure the whale.

The matter of the seals is not in controversy, as it is admitted that each of the whole crew is entitled to be paid, 19s. being his share.

It is not asserted that at the time the nine men left the vessel any arrangement was made as to the participation in her subsequent earnings, but the defence set up is that they were short of provisions and left the vessel for the benefit of all concerned, so that those left in charge of her should have sufficient to subsist upon until her release and arrival home; and as, by their agreement before proceeding upon the voyage, they were to have a share of the vessel's earnings, they claim a right to a share of the whale in question.

On the part of the plaintiff six of the crew were produced, and in their evidence stated that when the men left the vessel there were ample provisions remaining to last until the month of June, and that nothing was said on board about their getting short. They all admitted that there was a scarcity of bread, but swore that there was a sufficiency of flour and pork to supply its place; and, to support their statements, they proved also that upon the termination of the voyage, although they had been detained a fortnight extra in securing the whale, they landed from the vessel in St. John's two barrels and one-third of flour, nearly a barrel of pork, a firkin of butter, and a quantity of tea and molasses, and that, besides these provisions, the captain sold in Burgeo, on their way home, one barrel of flour and other articles of surplus stock, in part payment for labor in sculping the whale. This statement, if incorrect, might easily have been disproved by disinterested and independent testimony.

Added to this was the testimony of the defendant (who certainly did not appear to favor the plaintiff's claim) that ten weeks' provisions were supplied to his vessels at the commencement of the fishing voyage—and also the fact that the vessel was in a Western port at an advanced time of the spring, when long detention could not be apprehended, and when released might obtain supplies, if needed, without difficulty.

It was also proven that the men who left the vessel arrived in St. John's on the 2nd of May, and sometime before she arrived nearly all of them were shipped for the summer fishing and earning their summer's wages.

In support of the defence six of the crew who had left the vessel were produced, some of whom stated that they had been put upon short allowance, others that they were short of provisions and would soon have to be put upon short allowance, and others heard that provisions were getting short, and all declared that the scarcity of provisions was the cause of their leaving the vessel, whilst they still admitted that there were three barrels of flour, one bag of bread, one barrel of pork, and a quantity of butter, tea and molasses still unconsumed.

Upon the whole of this evidence I am of opinion, beyond doubt, that the defence set up, that the men were compelled to leave the vessel from scarcity of provisions (even if the defence would avail) has not been established, but that they, being desirous to get to their homes without delay, and seeing no prospect of getting seals, abandoned the voyage with the assent of the master, which was not, however, given without some hesitation.

The plaintiff, therefore, is entitled to his share of the whale, as claimed by him, which will under the evidence be £9 6s. 1d., and, with the share of seals (19s.), will amount to £10 5s. 1d.

Against this amount the plaintiff admits an offset of £2 13s. 10d., and that he agreed to pay £2 for berth money; but he claims a reduction in this latter amount in consequence of his having performed the duties of cook after the departure of the men from the vessel (the cook being one of them), and, as it was shown that the cook was entitled to a free berth, I reduce this charge to 20s.

The only other matter in controversy is with regard to a sum of £10 paid by the captain to parties in Burgeo for sculping the whale, the defendant contending that, where anything is paid for labor which the crew ought to and could perform, they should bear the whole charge, and consequently that the plain-

tiff should bear one-ninth part of this amount; but it was proven by the plaintiff's witnesses that they were unacquainted with the method of sculping the whale, and that by agreement with the captain they were to bear but half this charge.—Under these circumstances the plaintiff is only bound to contribute the sum of 11s. 1d. towards this amount. These sums added will make £4 4s. 11d., which being deducted from £10 5s. 1d., will leave a balance of £6 0s. 2d. due to the plaintiff, for which amount I give judgment.

As there are several other claimants of this property who have agreed that their claims shall abide by the decision of this court in the present case, I have thought it advisable, for the satisfaction of all parties, to submit to the opinion of my brother judges, and, having done so, they both agree with me in the opinion I have formed and the judgment I have given.

*Mr. Parsons* for plaintiff.

*Mr. Boone* for defendant.

## RENDELL & CO. v. DUDER.

1872, July. HON. MR. JUSTICE ROBINSON.

*Shipping—Insurance—Total loss—Abandonment—Freight paid by agent of underwriters, right to set-off freight against insurance on cargo—Practice—Set-off.*

The defendant became an underwriter on a cargo of lumber which became a total loss, and an abandonment of such was accepted. At the express request of the underwriters, and for them, the plaintiff appointed an agent to realise the wrecked cargo. The agent, out of the proceeds of the cargo, appropriated \$320 to satisfy a claim preferred by the master of the wrecked ship for freight *pro rata* on said cargo. In an action against the underwriters for the insurance it was contended that the underwriters had the right to set-off against the plaintiff's claim the sum so paid by the agent for freight.

*Held*—No such right of set-off could be maintained. The cargo was abandoned and accepted by the underwriters; the original owner ceased *ipso facto* to have any concern in it.

FROM the facts admitted or proved in this case it appears that the defendant became an underwriter on a policy to insure a cargo of lumber belonging to plaintiff, from New Brunswick to St. John's; that on the voyage towards St. John's the vessel was wrecked at St. Pierre; that the underwriters admitted the

loss to be total and accepted an abandonment of the cargo; that the plaintiff, at the express request of the underwriters and for their benefit, appointed Mr. McLaughlin an agent in St. Pierre for the purpose of receiving and remitting, on behalf of such underwriters, the proceeds of the wrecked cargo; that the cargo was realized and handed over to McLaughlin; that McLaughlin was also appointed by the owner of the ship to represent his interests; and that he (McL.) appropriated out of the proceeds of the cargo £80 to satisfy a claim preferred by the master for freight *pro rata* on said cargo to St. Pierre.

The question for our determination is whether, under the foregoing state of facts, the underwriters of the cargo are entitled to set-off against the plaintiffs' claim the sum so paid by their agent for freight? And we are all of opinion that they are not.

The money was paid solely for the benefit of the underwriter and by his own agent; the moment the cargo was abandoned and the abandonment accepted by the underwriter the original owner ceased *ipso facto* to have any concern in or any power over such cargo, it became the property as it were by purchase of the abandonees, who might leave it to its fate or save and realize it as they pleased, whatever expenses might necessarily be incurred to enable them to obtain possession of it must be borne by them and not by the plaintiffs, who had no interest in the transaction and did not intermeddle therewith except at the request of the underwriters and for their benefit.

We are aware of the judgment delivered by the Supreme Court of the United States to the effect that an underwriter on goods may under certain circumstances charge the owner of such goods with the *freight* paid to obtain possession of them, but we are not aware of any decision of an English court to the same effect, and the English text writers question its soundness; but whatever may be its authority we think that the facts of the liability for freight *pro rata* having been created by the underwriters through their own agent accepting the cargo at St. Pierre, and not by Rendell, and of the money having been paid for their use and not for his, withdraw the present case from the operation of any precedent to be found.

Mr. Carter pressed us with the authority of *Baillie v. Mudgeiani*, and stated truly that from the time of Lord Mansfield it has been settled law that the underwriters on a cargo are not as such responsible for a claim of freight preferred by the ship's owner and paid by the shipper of the goods; but the plaintiffs

here are not preferring any claim on the foot of freight, they did not insure any freight, they owed none and they paid none; it is the defendant who paid freight in order to obtain possession of his own goods for his own benefit, and now asks the plaintiff to indemnify him for such payment thus voluntarily made on his own behalf.

The plaintiffs are entitled to the amount insured (£174 7s. 3d.) less the amount they have been paid (£92 17s. 2d.), leaving a balance of £81 10s. 1d., for the defendant's proportion of which sum judgment must be entered in favor of the plaintiffs.

*Mr. Whiteway, Q. C.*, for plaintiffs.

*Mr. Carter, Q. C.*, for defendant.

## UNION BANK v. WALBANK, ADMR. KENT.

1873, *July*. HOYLES, C. J.; ROBINSON, J.; HAYWARD, J.

*Imperial statute 9 Geo. 4, cap. 14, sec. 6—Construction of—Misrepresentation, what is necessary to establish—Practice—Injunction to stay proceedings where monies paid on false representation.*

In an action against the defendant for representing that "A" had been granted letters of administration to the estate of her late husband, whereby a bank holding monies of the said deceased was induced to pay over the same to "A," whereas the defendant at the time he made such representation, knew the administration had not been granted, by reason of the bonds required for same not having been perfected; it appeared at the trial that the written representation relied on was the defendant's writing the name of A. as administratrix on a receipt given to the bank for such money, and signing his own name as witness.

*Held—*(Hayward, J., differing). Such a writing was sufficient to satisfy the statute of Geo. 4, cap. 14, sec. 6, which declares that no action shall lie to charge any person upon or by reason of any representation made or given relating to the character, conduct or ability, &c., &c., of any person to the intent that such person may obtain money thereupon unless such representation be made in writing signed by the party to be charged therewith; but that as it appeared from the evidence that the representation was not made with the "intent" required by the statute, and as it also appeared that the bank acted on the verbal statement of the defendant in paying the money made previous to the giving of the written representation and was not substantially induced by the same, the case was not one coming within the meaning of 9 Geo. 4, cap. 14, sec. 6.

THE bill in this suit was filed under the following circumstances:—

In June, 1869, the above named James Kent died, being possessed at the time of his decease of a sum of five hundred pounds, which had been lodged by him in the Union Bank and for which he had taken deposit notes in the usual form.

Shortly after his decease his widow, Catherine, who appears during his life to have frequently acted for him in his dealings with the bank, presented the deposit receipts at the bank and requested payment of them. She was told by the cashier, Mr. Greene, that before the amount deposited could be paid to her she must administer to her deceased husband's estate, and, acting upon this information, she instructed the defendant, Robert J. Kent, a proctor of the Supreme Court, to take out administration in her behalf.

Mr. Kent prepared the necessary papers and made an application in due course, obtained a judge's fiat for the grant of administration, and arranged with two responsible sureties to give the usual security, and nothing remained, so far as then appeared, to complete the widow's title but the execution of the usual documents according to the accustomed forms of the registrar's office.

On the 5th of July, and before these documents were completed, the widow again applied for payment of the deposit notes, telling Mr. Greene that she had been duly appointed administratrix; Mr. Greene declined paying upon her word only, and, as would seem, sent her for Mr. Kent, with whom she presently returned to the bank.

Mr. Greene then, as he alleges (an allegation, however, which is directly contradicted by Mr. Kent), inquired of Mr. Kent if the widow had taken administration and was entitled to receive the money, and, being answered by Mr. Kent in the affirmative, he paid the widow the amount of the notes with interest.

Mr. Greene wrote receipts upon the notes, which the widow signed by making her mark, Mr. Kent writing her name with the addition of the words "Administratrix of James Kent, deceased," and then signing his own name as witness.

It afterwards appeared that the sureties upon whom Mr. Kent relied withdrew from their engagement, and the widow being unable to procure others, the fiat for the grant to her was virtually cancelled, and a few weeks later administration was granted to the defendant (Walbank), who commenced an action against the bank to recover the value of the notes previously paid to the widow.

Upon this the bank filed their bill in the present suit to restrain Walbank's action, to be allowed in account against the amount of the deposit notes sought to be recovered such monies as the widow had paid in due course of administration, together with her share of her husband's estate, and for relief as to the balance against the defendant, Kent, on the ground that he having, as they alleged, by a misrepresentation, misled the bank as to the widow's right, he was bound, in accordance with well established principles of equity jurisprudence, to indemnify them against the consequences.

The widow had died in the early part of the year 1871.

During the pendency of this suit a reference of the accounts of the estate of the deceased, James Kent, was had by consent, by which it appeared that the balance for which either the bank or the defendant, Kent, was answerable was about seven hundred and fifty-six dollars.

Upon this state of facts Mr. Pinsent for the bank contended in relation to Walbank's claim that, as a deposit note passed by delivery (*Vice C. Stuart, in Woodham vs. Anglo Alsot Ins. Co., 8 Jur., N. S. 148*), and as the widow had generally acted for her husband in his dealings with the bank, and was in fact an *executrix de son tort*, in which capacity she might do many acts that would bind the estate, *Urns. Exers.*, his clients were discharged by payment to her, and that if not they were, under the evidence, entitled to relief against Kent for whatever Walbank might recover from them.

Mr. Carter, who represented both defendants, maintained the contrary of these positions.

It seems clear that the complainants cannot resist Walbank's claim for what may remain of the amount of the deposit notes after crediting them with the widow's share and with what was paid by her in course of administration.

No authority, I think, can be cited to shew that beyond these allowances the payment to the widow as *executrix de son tort* would be good; and, as regards the dictum of V. C. Stuart, that learned judge must be assumed, looking at the subject matter of the case before him, to have spoken with reference to the doctrines governing the transfer *in equity* of choses in action for a valuable consideration.

Further, in the present case there was no evidence of any delivery by the owner to the widow with intent to pass the property; she appears to have had a mere naked possession by

reason of the notes having been in her care at her husband's death, or having been taken possession of by her afterwards.

The real question in the suit, and one of some difficulty, is as to the defendant Kent's liability over, and this depends, as it seems to me, upon—first, the necessity or otherwise for a *written* representation by him under the terms of the 9 Geo. 4., cap 14, sec. 6; secondly, upon the *existence* of a written representation, if necessary; and thirdly, upon the conclusions to be drawn from the conflicting evidence put before us, should a writing be *unnecessary*. The discussion of the last point, however, I am fortunately spared, because after much consideration I am satisfied that the 9 Geo. 4 does apply to this case, and that no written representation such as is required by the statute was in fact made by Kent.

The words of the Act are "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person to the interest or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith." Now, this word character, like the following words conduct, credit, ability, trade, dealings, is a very general and comprehensive term. It may mean a moral, professional, legal, commercial, and many other characters, any of which may be the subject of misrepresentation to the injury of third parties. In one case, *Tatton & Wade, 18 C. B.*, it is taken to include moral character, and by counsel, official character; in *Lyde & Barnard, 1 M. & W.*, it is applied to a person's solvency; among the many explanations of the word in Webster's dictionary we find "official character." It was in her official, legal or representative character as administratrix that the widow claimed this money. Had she sued for it in a court of law she could have recovered only by reason of her holding this character; because she was supposed rightly to possess it the money was paid to her, the alleged representation was that she really filled it.

Mr. Pinsent contended that the representation, to come within the Act, must be of something personal to the party referred to and not in relation to some collateral object, and that the representation in the present case was of the *fact* of administration having been granted to her; but, admitting the distinction taken between matters, personal and collateral, to be well

founded, I may observe that the representation charged is that the widow "was administratrix," but had it been of the fact of the grant merely it would be but another mode of expressing the idea that she represented the deceased, had been clothed with the character of his successor, and, if made for the purpose of obtaining money, goods or credit, would, in my opinion, clearly come within the *words* of the Act.

This, however, would not be sufficient unless it also came within the mischief aimed at by the statute—*Dwarris*, 692, 725.

The 9 Geo. 4, c. 14, 56, is said by the authorities (*see Lyde & Barnard*, 1 *M. & W.*) to have been passed for the purpose of meeting an evasion of that part of the Statute of Frauds which requires a note in writing to render one person liable for the debt or default of another.

The evasion consisted in suing in tort for a false representation instead of in contract as upon a guarantee.

The object of the Act was the same with that of the Statute of Frauds, namely, to lessen the liability of one party for the act or default of another, and to prevent the perjury, litigation, and fraud (fraud sometimes upon the party making, sometimes upon the party receiving the representation) which too frequently were the consequences of verbal representations. The Act effects its objects by rendering verbal representations in the instances specified altogether invalid, thus preventing the receivee from relying upon them, and the maker from having to answer in damages for what might be merely an innocent exaggeration.

It is obvious that as much mischief might be occasioned by a representation of a person's official as of his moral or commercial character, and although the Act was probably directed, principally against those of the latter class, yet being remedial and therefore to be construed literally, (1 *M. & W.* 119) cases falling as the present does within both the words and the meaning of the Act, must be held to come within its operation.—*Dwarris*, 702.

Upon this point Lord Abinger in *Lyde and Barnard*, remarks "the author of this statute appears to have had the Statute of Frauds before him. Some of his words are adopted from that statute, and where he has repudiated the words and adopted others, he seems to have done so with a view, not to narrow but to extend the remedy to all possible cases, in which litigation, fraud or perjury might be prevented, by re-giving a written document to attest a representation or assurance concern-

ing or relating to the conduct, character, credit or ability of another, by means of which the party making it intended that other person to obtain money, goods or credit."

Assuming the necessity for a written representation, was there in the present case one such as the statute requires.

The writing relied upon by Mr. Pinsent was, that Kent wrote the widows name to the receipt prepared by Mr. Green (she making her mark) adding in his own hand, under her name the words "administratrix of James Kent, deceased," and further, that he wrote upon the receipt an attestation of her signature thus "witness, R. J. Kent"

In support of the position that this signing as a witness only was sufficient within the Act. *Welford and Beagely*, 3 *Atkins*, 503, and *Coles and Grecothick*, 9 *Vesey*, 234, were cited. In *Coles and Grecothick*, however, the party signing though for some reason he wrote "witness" before his name, did in fact sign as and for the principal whose agent he really was. The case therefore is not in point

In *Welford and Beagely*, a woman principal in an agreement by which she contracted to settle £1000 upon her daughter, signed as witness a marriage settlement in which her own agreement appears to have been recited, and it was held by Lord Hardwicke that upon the principle upon which it had been determined, that a letter written and signed by a principal to his agent, reciting an agreement he had made, was a sufficient note or memorandum to satisfy the fourth section of the Statute of Frauds, the signature as "witness" in the principal case was sufficient.

In *Gosbell and Aucher*, 2 *Ad.*, and *Ellis* 500, this decision seems to have been questioned, but regarding it for the purpose of this argument as an authority in itself, it does not in my judgment govern the present case, because the wordings of the two Acts differ.

The words of the Statute of Frauds are "unless the agreement or some memorandum or note thereof shall be in writing and signed by the party," &c.

The words of the 9th Geo. 4, are "unless such representation or assurance be made in writing (nothing said of a note or memorandum) signed by the party," &c.

This requires that the representation be the party's own, the party, that is (a note or memorandum would be insufficient) charged by the representation, and that it should be signed by him. The representation of character on the receipt was not

Kent's but the widow's: he wrote it as her agent or instrument, and could not be held liable upon it as the principal, and he signed, not the representation, but the attestation to her mark.

There has been consequently no compliance with the requisites of the statute so as to make Kent liable in this suit.

The bill therefore, as against him, should, in my opinion, be dismissed, but without costs, because, without offering any opinion as to whether the verbal representations alleged on one side and denied on the other was in fact made, and while giving Kent credit for good faith, and a full belief that the bank would be safe in making the payment, I think he ought not, under the circumstances, to have permitted his client to receive the money until the grant of administration had actually passed.

On the other hand, I do not think the cashier should be held personally responsible for the loss, for it does not appear that he was to blame in any way.

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HON. MR. JUSTICE ROBINSON :

I have arrived at the same conclusion as that reached by the Chief Justice, but by a different process of reasoning, and I state my views for the benefit of those concerned.

According to my judgment, this bill should be dismissed, and the injunction granted at the instance of the complainant should be dissolved, upon the administrator of James Kent undertaking to issue execution on his judgment at law for \$756 only, and cost of that action.

As regards Mr. Walbank, he should be allowed his costs in this suit, because the bank had no valid ground for suing him; the money deposited in the Union Bank by the deceased, James Kent, in his own name could, during his life, legally be repaid only to him or to his assignee if he had made an assignment, and after his death to his personal representatives. He made no assignment and Walbank is his representative, the payment therefore by the bank to the widow was no better than to a stranger and was made in their own wrong.

As regards Mr. Robert Kent, although the bank has failed against him also he should not be allowed costs. The whole evidence, verbal and written, satisfy me he misled the bank into their wrongful payment of £500 and interest by representing to the accountant, Mr. Greene, that Mrs. Kent was the

administratrix of her late husband, and that the money might properly be paid to her, whereas in fact and to the knowledge of Mr. Kent she was not such administratrix.

That such a misrepresentation (if legally evidence) would render the person making it responsible for the loss occasioned directly by it, is as consistent with natural equity as with common law, even though it be made without any intention to deceive, "for every man must be held responsible for the consequences of a misrepresentation upon which another acts to his injury, provided such misrepresentation was made with the direct intent that it should be acted upon."—(*Collins v. Qave*, 6 H. & N. ; 3 Ste Com. 542 ; *Evans v. Bicknell*, 6 Ves. ; *Jordan v. Morey*, 5, H. of Lords, *Geral v. Bates*, 2 Ell. & B. ; *Slimm v. Croucher*, 1 Deg. F. & J. ; *Foster v. Charles*, 7 Bing. ; *Tatton v. Wade*, 18 C. B.) And Mr. Kent must have recouped the Bank the loss it has sustained but for the provisions of the Imperial statute 9 Geo. 4, c. 14, sec. 6, which declare "that no action shall lie to charge any person upon, or by representation made or given relating to the character, conduct, ability, &c., &c., of any person to the intent that such person may obtain money thereupon unless such representation be made in writing, signed by the party to be charged therewith."

Mr. Pinsent contended that the word "character" had only relation to moral rectitude, but the term is sufficiently comprehensive to embrace the representative capacity of a person, in which sense, viz. : as descriptive of the capacity of executor, administrator, trustee, the word is used in various law books, and in several adjudicated cases (1 Ste. pp. 9, 14, 15, 16, 23, 47, 206, 6 East, 4-5). Such meaning is as much within the mischief aimed at by the statute, as any other meaning of the word, and should not be arbitrarily excluded; the representation of such character must therefore be evidenced by writing before an action upon it will lie.

But Mr. Kent is shewn to have written the name of Mrs. Kent to a receipt for the money paid by the bank, in which paper he represents her "as administratrix of James Kent," and subscribes thereto his own name in testimony thereof, and it is submitted that such writing supplied all the evidence required by the statute. Now, seeing that the only object of the Act is to protect a party from light imputations of having made a representation which in truth he did not make, by requiring written evidence of the fact, I think this document written by Mr. Kent with his own hand, under the special cir-

cumstances detailed in evidence, and with a full knowledge of all the facts is quite sufficient to satisfy the statute, which only requires a representation in writing although he does sign as a witness, and for this position I rely upon the authority of Lord Hardwicke in *Welford v. Beasley*, 3 *Atk*, approved by Lord Eldon in *Coles v. Necothick*. It is true that the Court of King's Bench in *Gosbell v. Archer*, 2 *Add. and Ell.*, were unwilling to carry Lord Hardwicke's decision beyond the facts on which it was founded, the Chief Justice rather disapproved of its principle, but the other judges seem to have recognized the sufficiency of a signature as a witness when subscribed with a full knowledge of the facts, and *Beasley v. Welford* continues to be cited as an existing authority in relation to the Statute of Frauds, which required more than the 9 Geo. 4, in the latest edition of standard text books.

But assuming this writing to be sufficient in law, two facts still remain to be established before Mr. Kent can properly be held responsible under it, viz.: 1st, was the written representation made with "the intent" referred to in the statute, and 2nd, was Mr. Greene induced thereby to pay the money, or had he been previously satisfied by the oral representations of Mr. Kent.

Now the weight of the evidence submitted to us leads me to the belief that Mr. Greene acted upon the verbal statements of Mr. Kent, for by them he had professed himself satisfied before he delivered the deposit note to be receipted whilst he was preparing the money to pay over to the widow.

On the one hand it is probable that he may have been influenced both by the verbal and by the written statement, but unless he was *substantially* induced by the written representation to part with the money, *Tatton v. Wade* is an authority in Kent's favor; on the other hand it is possible that the accountant would not have parted with the money under any circumstances short of getting a written discharge from the alleged administratrix.

On this crucial point of the case the evidence is not conclusive, and if an application had been made, I for one would have been willing that it should have been more fully investigated by a jury, on hearing the testimony of witnesses *viva voce*, especially as the evidence taken before the examiner is admittedly imperfect, and this particular question does not appear to have been prominently before the minds of the parties; however, no application to have an issue sent to a jury was

made, the evidence before us is sufficient to lead to a conclusion, and we must take it as it is, and act upon it.

Whilst Mr. Kent is thus absolved from liability solely by reason of the protection of the statute it would be inequitable to allow him his costs against the complainant whom he has damaged, and as regards such defendant the bill should be dismissed without costs. Professional habits should have induced Mr. Kent either to have declined altogether making any statement, or to be more cautious in his representation to the bank when formally asked for information touching a matter of fact peculiarly within his professional knowledge, nevertheless, I believe he acted in good faith. He alleges that he had obtained the promise of two gentlemen to become sureties for his client, and that deeming their word equivalent to their bond he expected that the letters of administration to the widow would ultimately be perfected, in which expectation he has, however, been disappointed, and has misled others to their injury.

I concur in the opinion that negligence cannot properly be imputed to Mr. Greene for acting upon the representation of Mr. Kent. The manager of the bank deposes that he would have sanctioned the course adopted by the accountant had he been consulted, and that it is usual to rely upon the statements of professional men of standing regarding matters of fact. I suppose no one will question the reasonableness of that practice, for I do not see how the business of commerce could be conducted if truth should be ignored, and every statement should need verification by legal evidence before being acted upon in the daily transactions of the bank.

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**HON. MR. JUSTICE HAYWARD:**

The bill in this suit sets out that James Kent, by the agency of his wife, Catherine Kent, deposited with complainants the sum of \$2,000, for which they gave deposit receipts. That James Kent died in 1869, and afterwards his widow, the said Catherine Kent, produced those deposit receipts at the bank and requested payment, which was refused until administration should be granted.

That subsequently the said Catherine Kent, accompanied by the defendant, the said Robert J. Kent, who was known to complainants to be a barrister of this court, called at the bank and

presenting the receipts claimed payment—the said Catherine Kent representing herself as the administratrix of her husband's estate, and the said Robert J. Kent representing that payment to her would be all right as *she had been appointed administratrix*, and that only some formality was to be observed which would be completed, upon which representation the amounts of the deposit receipts were paid.

That the defendant, Walbank, was afterwards appointed administrator to the said estate, and as such demanded and sued for the amount of the said deposit receipts.

Under these and other circumstances the complainants pray for an injunction to restrain proceedings in the action taken by Mr. Walbank against them—also that the payment of the amounts may be declared to have been valid and acquiesced in, or that the administration and distribution thereof by the said Catherine Kent have sufficiently accounted for the same—otherwise that the said Robert J. Kent be made responsible to indemnify complainants for any loss they may sustain.

Under this statement of the case and the evidence, I am of opinion that the complainants should receive the benefit of such amount as may have been paid by the said Catherine Kent in the course of administration, and also of her share of the estate, and should—after these deductions are made—be responsible to the defendant, Mr. Walbank, in his action at law for the amount of the said deposit receipts.

The bill, therefore, as against him should be dismissed with costs and the injunction discharged, and he should be entitled to enter up judgment in his action at law for \$757.31.

As regards the said Robert J. Kent, if the allegations contained in the complainant's bill be sustained, viz.: that he represented that Catherine Kent had been appointed administratrix, in consequence of which they paid her the amount of the deposit receipts, whilst the fact was that she never did receive such appointment; I am of opinion that he would be responsible in equity to indemnify the complainants for any loss that they have sustained in consequence of such misrepresentation.

Mr. Kent, however, denies the allegations in this particular, and in his answer states that the information he gave the complainants was that a judge's fiat had been granted, after which the sureties who had promised to sign the necessary bonds refused to do so, in consequence whereof she failed to perfect the administration for which the fiat had been granted.

The only witnesses examined in support of the bill and answer were Mr. Greene, the principal accountant and teller of the bank, and Mr. Kent, the defendant, and there is such a contradiction of facts in their examinations that an issue should be directed to be tried and the parties examined *viva voce* before the court in order to enable us to ascertain if the defendant really did or did not make the representation charged in the bill.

As regards the conduct of Mr. Kent, the defendant, I think it fair towards him to remark that in this transaction he appears to have acted *bona fide*, and at the time that the money was paid he was under the belief, as he reasonably might have been, that the administration would have been perfected in due course; yet, no matter how honestly or innocently, if the alleged representation was made by him, and the complainants induced thereby to part with their money, he would in equity be liable to indemnify them against the loss occasioned; and, as regards Mr. Greene, I think it fair towards him to state that there is nothing in the evidence which attributes blame or shows negligence on his part.

Upon the argument had it was contended by Mr. Carter, for the defendant, that even if the complainants could sustain their allegations (which he denied that they could), still that the representation being oral would not be binding upon the defendant, inasmuch as the statute 9 Geo 4, cap. 14, sec. 6, provides that "no action shall lie to charge a person upon or by reason of any representation or assurance made or given relating to the *character*, conduct, ability, trade or dealings of any other person to the intent that such other person may obtain credit, money or goods thereupon, unless such representation, &c., be made in writing, signed by the party to be charged therewith," and he (Mr. Carter) contended that the representation said to have been made in this case fell within the provisions of the statute which required it to be in writing to make the party answerable; that the terms "character," &c., were sufficiently large to embrace official or representative character as well as moral character, and should be so construed.

Mr. Pinsent for complainants, on the other hand, contended that the representations made were not such as are required by the statute to be in writing; that the statute was designed to give fuller effect to the provisions and policy of the Statute of Frauds, 29 Car. 2nd, and in relation to the same subject matters; and also that the terms "character, conduct, ability," &c.,

were all words of the same class and related to the personal reputation, course of dealing, and means of the party about whom the representation was made, and did not refer to official position or legal authority

I have given much consideration to this point of the case (which is one of much difficulty) and with every desire to give the most liberal construction possible to the terms of the statute. I cannot arrive at the conclusion that the representation said to have been made relates to "character, conduct, ability, trade or dealings," and, therefore, I am of opinion that it is not within the statute and that a writing is not required to create a liability on the part of the defendant, but that the verbal representation (if made) is sufficient of itself to make the defendant liable to indemnify the complainant against any damage they may have sustained thereby.

The representation alleged to have been made by Mr. Kent was "that Mrs. Kent" (his client) "had been appointed administratrix," and the question for decision is, does that assertion relate to character as contemplated by the statute? It is urged that it does because it refers to her as possessing the character of administratrix. If this be good reasoning the term would have a most comprehensive signification, for all professional and scientific men act in their character as such, so do principals and agents and masters and servants, so merchants, artisans, fishermen, tradesmen, shopkeepers, &c., in fact, men in all the relations and occupations of life may be said to act in some character or another, as the party in this case is said to have been represented as acting in the character of administratrix. To this class I am of opinion that the terms of the statute do not apply.

But a person may allege of another that "he is an honest man," or that "he is one that may be trusted and is owner of an estate," and the like—the former would be a representation of "character" and the latter both of "character and ability," and, if untrue, would be mis-statements, for which the party making them would be liable if upon their faith the person to whom they were made gave credit, money or goods; but, being clearly within the statute, the statement should be in writing to make it binding.

With respect to this class of cases I think that the statute should receive a most liberal construction, but I think that it would be straining it altogether too much in including the former class by holding that a man who says of another "he

has been appointed administrator" makes a representation relating to his "character." I regret being in the minority, and being compelled to give an opinion at variance with those of my brother judges, who have held otherwise than I have, and who have, therefore, disposed of the case. If they were of opinion that Mr. Kent would be liable under the statement contained in the bill, I would, as I have before remarked, deem it necessary to refer the case to an issue to decide the disputed fact, but that is obviated under the circumstances.

*Mr. Pimsent, Q. C.*, for complainant.

*Mr. Carter, Q. C.*, for defendant.

IN RE M. G. JAMES, *alias* WILLIAMS, AN INFANT.

1873, *July*. HON. SIR H. HOYLES, C. J.

*Contempt of Court—Habeas corpus—Non-production of Infant—Attachment—Bail—Rule nisi to discharge.*

On an application for a writ of *habeas corpus* a judgment of the Court was given against the defendant, to the effect that an infant in the custody of the defendant as a mere caretaker, should be restored to its mother. No regard was paid to the judgment and the writ was issued, to which no return was made, and the defendant was adjudged guilty of contempt of Court, and an attachment was issued under which she was held to bail to answer for contempt. On a motion for her discharge from custody, it was set up as a sufficient answer for not obeying the writ that the child, in the absence of the defendant from her house, had been abducted, but after the judgment and after the issue of the writ.

*Held*—The disregard and defiance of the judgment of the Court rendered her responsible for the safe keeping of the child, and, in the absence of irresistible force, bound her to its production.

In this case an application was made in the last December term by the Rev. George M. Johnson as agent and attorney of a Mrs. Bell, formerly Alice Elizabeth James, for a writ of *habeas corpus* to bring before the Court one Mary Georgina James, *alias* Williams, the infant daughter of the said Mrs. Bell.

The application was based upon petition and affidavit, setting forth that in July, 1870, the mother of the child who then

and for some years previously resided in St. John's, left St. John's for Quebec to seek a livelihood; that before her departure she placed her child, then about eight years old, in the care of a Mrs. Hurley—that after some weeks Mrs. Hurley, who received a small Government allowance for the maintenance of the child, declined to keep it any longer, and it was transferred by the Poor Commissioner to the custody of the said Mary Walsh, whose occupation appears to be to take charge of a certain number of destitute children for the Government at the rate of so much per head. That in July, 1871, the mother had sent to Mr. Johnson to have the child forwarded to her at Quebec, but for some reason not appearing on the papers, this request had not been complied with, and that in the following season, July, 1872, a further and more urgent application was made to him with the same object.

That in accordance with these requests, Mr. Johnson applied repeatedly to Mrs. Walsh for the child, but without success, Mrs. Walsh though at one time promising to send her to Mr. Johnson's house, finally refusing to restore her, saying to him, "you're not going to get the child at all." That an application made by Mr. Johnson to the Government to compel the delivery of the child was also ineffectual, they (although as appeared, discontinuing the allowance made to Mrs. Walsh for the child) having no authority to interfere by force, and referring Mr. Johnson to the courts of law for redress.

Upon these facts a rule *nisi* for a *habeas corpus* was granted on the 6th December, 1872, to which Mr. Raftus, on behalf of Mrs. Walsh, shewed cause, Mr. Whiteway, Q. C., for petitioner, supporting the rule.

Mr. Raftus read an affidavit of Mrs. Hurley, alleging that the child had been deserted by the mother, and was not left in her charge, and that she (Mrs. Hurley) had subsequently received a letter from the mother which had been destroyed or lost, in which no reference was made to the child. He read also an affidavit of Mrs. Walsh, alleging that the child was unwilling to go to Mr. Johnson, and was terrified at his coming to the house to demand her; that it would prejudice the child's health if removed from her charge and that a strong affection for each other had sprung up between her and the child, and he contended citing (*Re Lloyd, 3, M. & G., 547*) that the child being illegitimate, the mother had no right to its custody, and that being now ten and a-half years old, and having become a Roman Catholic since she had been placed with Mrs. Walsh,

she ought to be allowed to exercise her own discretion as to the choice of a guardian.

Mr. Whiteway read affidavits of Richard Yabsley, alleging that the mother had always maintained the child until she left for Canada, had not deserted her, and had kept her to school for three years prior to her own departure; that she *had* been placed with Mrs. Hurley as before stated, that the mother had written to him, expressing great affection for her child and anxiety to have her sent to Quebec, saying that she had sent money to Mrs. Hurley for the maintenance of the child, and was saving money to defray her expenses to Quebec, and that the child had in the preceding Spring expressed to him a desire to go to her mother. He read also an affidavit of Catherine Witherington, who was acquainted with the mother in Quebec, alleging that the mother had frequently expressed great anxiety respecting the child, and on some of these occasions, had cried and complained of the persons who she said were endeavouring to keep her child from her, that she stated that she had sent money and clothes to the child, and she begged deponent to make enquiries after her and assist in restoring her, and citing *Kiyd on Infants*, he contended that the child was too young to be permitted to choose a guardian for herself, and that the mother had a right to the custody of her child, even though it were illegitimate, although that fact did not conclusively appear.

The Court took time to consider their judgment, and on the 12th of December made the rule absolute, deciding for reasons then given at length, that as between the mother and a mere caretaker, the rights of the mother were paramount, that the child was of too tender an age to choose a guardian for herself, and that the child should be restored to her mother.

In making the rule absolute, the Court directed that the writ should not issue for twenty-four hours, assuming that the judgment of the Court thus finally adjudicated upon the rights of the parties being made known, it would, in accordance with the usual practice, be at once accepted, and that compulsory process would not be necessary.

It appeared, however, that in this assumption they were mistaken, no regard was paid to the judgment by Mrs. Walsh, and on the 13th the writ was issued, returnable on the 16th, and was with a written notice, or warning of its purport and effect, personally served on her on the 14th of December.

On the 16th, being the last day of term, no return whatever was made to, or notice taken of the writ by Mrs. Walsh, or by her counsel, and she was accordingly adjudged guilty of contempt, and an attachment was issued under which she was held to bail, to answer for her contempt in the present term.

In the early part of this term, Mr. Whiteway moved for judgment upon Mrs. Walsh, and Mr. Raftus moved that she should be discharged from custody. A rule *nisi* was issued upon which both motions came on for hearing on the 7th of June instant, and of these we have now to dispose.

Mr. Raftus based his motion upon an affidavit of his own, by which he explained, that the fact of no return of any kind being made to the writ on the 16th December, was owing to his mistake, in supposing that the state of business in the Court on that day would prevent the case from coming on, and for the merely formal part of the contempt, some explanation, however unsatisfactory, as coming from a professional man who ought to have known the peril to which he exposed his client has thus been given, but the substantial question in the case is, has Mary Walsh shewn a sufficient excuse for disobeying the writ of *habeas corpus*, by not producing the child, and after a consideration of the arguments on both sides and of the matters contained in two other affidavits of Mary Walsh, used by Mr. Raftus in support of his motion, we are clearly of opinion that she has not.

In her affidavit sworn in December last, she states that being absent from her house from half-past six to half-past eight o'clock, on the evening of Saturday, the 14th December, she found on her return that the child was absent, that she and the neighbors made search for her but could not find her, and that she then reported her loss to the police; that she knows nothing whatever of any circumstance connected with the departure of the child, was not a party or accessory thereto; does not know whether her departure was voluntary or compulsory, and does not know whither the child went. In her affidavit, sworn in May last, she states that she was not a party to the abduction of the child, does not know who took her, whither she was brought, or where she now is.

It is difficult to believe that any one would deliberately commit the gross contempt here impliedly charged upon some parties in the abduction of the child, knowing, as they well must have known, the severe punishment which, whoever they may be, they will certainly receive should they be discovered;

but assuming for the argument that Mary Walsh was not actively concerned in the abduction of the child, she, nevertheless, cannot be held excused, because she should have rendered up the child when she had it in her possession, during all the time subsequent to the rule being made absolute, and after the service of the writ upon her and up to the time of the alleged abduction. Her contemptuous disregard and defiance of the judgment of the Court in this respect rendered her responsible for the safe keeping of the child, and, in the absence of irresistible force or unavoidable accident, bound her to its production.

From the time of the service upon her of the rule *nisi*, indeed, when she was formally notified that the possession of the child was being challenged in a court of law, it was her duty to exercise all possible care and diligence for her safe keeping, and she cannot relieve herself from this obligation by swearing to what at the best shews her to have been guilty of gross and culpable negligence.

In a recent case in the Court of Queen's Bench, viz., on 25th November last, Mr. Justice Blackburn laid it down that parties withdrawing the child after notice of an application for a *habeas corpus* would be liable to severe punishment, and that service of a *conditional* order would be as effectual in that respect as service of an absolute order, and on that ground he refused an order for a writ in the first instance, observing that if the "parties in that case withdrew the child they would be liable to such very heavy punishment that it was hardly likely they would attempt to baffle the Court."

But, beyond all this, we are of opinion, that looking to all the circumstances of this case as above narrated, to her declaration to the petitioner that "he was not going to get the child at all," to her total disregard of the order of the Court when she had full power of obeying it, and to the entire absence of any search for or inquiring after the child from the day of its alleged abduction to the present, notwithstanding the warm affection said to subsist between them, and the alleged danger to the child's health from a forced separation, Mary Walsh's ignorance of the parties who took the child and of the place of its concealment, if real, was wilful and premeditated with the view of providing for her own escape from punishment for the non-production of the child, while avoiding the risk of compromising the other actors in the affair.

To disregard the natural claim of a mother to her possession of her infant child, and to permit the law to be thus set at

naught, and the authority and process of the Court to be thus trifled with, would be for us to abdicate our functions, to neglect our duty, and to invite the contempt to which Mary Walsh and those acting with her seek to expose the Court; and we have, therefore, but one course open to us, and that is to make the order usual in such cases, &c., to commit her to prison until she shall have cleared herself of this contempt by obeying the Queen's writ and producing this child.

*Mr. Whiteway, Q. C.*, for petitioner.

*Mr. Raftus* for custodian of infant.

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IN RE M. G. JAMES, *alias* WILLIAMS, AN INFANT.

1873, *July*. HON. SIR H. HOYLES, C. J.

*Habeas Corpus—Conviction for contempt in disobedience of—Imprisonment—Release of prisoner.*

Where after the prisoner who had been committed for contempt in disobeying a writ of Habeas Corpus to bring the body of a child before the Court in her possession when the writ was issued, had served six months imprisonment and had not delivered up the child; the Court were of opinion that the ends of justice were satisfied and released the prisoner.

BEFORE the rising of the Court on Wednesday last, Mary Walsh was brought to the bar in custody of the sheriff, and addressed by the Court as follows:—

Mary Walsh, in the last term of this Court you were convicted of a very grave contempt, in disobeying a writ of Habeas Corpus and becoming party to the unlawful abduction, by some evil minded persons, of an infant child named Mary Georgina James, and you were in consequence sentenced to be imprisoned until you should have delivered up the child, then supposed to be still within your power or knowledge, to its mother.

Under that sentence you have now been imprisoned for the period of six calendar months, but the child has not yet been produced, nor so far as we were aware, has anything been heard of it by its mother or by those interested, in her behalf, and we are therefore led to the conclusion that the parties who removed the child from your house took effectual means to prevent your

becoming acquainted with the place of its concealment, and that you are therefore unable to produce the child; and further, that these parties, indifferent to what you may suffer, provided they themselves escape, fear to return the child to your control lest they should thus afford means for their own detection, and subject themselves to the punishment which in that event awaits them.

Under such circumstances, to continue your imprisonment beyond what is necessary to satisfy the ends of justice, by meting to you a sufficient punishment for your offence, in refusing to obey the order of the Court when it was in your power to do so, and in making the opportunity for the abduction of the child, would be unreasonable, and as a means for the recovery of the child, in all probability unavailing, and it therefore became our duty to consider before the rising of the Court to-day whether we might not now set you at liberty, leaving it to the mother to resort to other means for the restoration of her child and for the discovery of the other parties to this offence.

After due consideration we are of opinion that you have been sufficiently punished and that we may now discharge you, believing as we do, that the punishment you have undergone will deter you from again offending, and others in the like case, from permitting themselves to be made the instruments of wrong, and that in our present inability to bring to justice the principal offenders, we have done all in our power to protect society from these, who by such acts as those here complained of, have not scrupled to assail society in its tenderest relations.

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1893, *July*. HON. MR. JUSTICE HAYWARD.

*Insurance Club rules—Construction of—Certificate—Security—Barratry.*

The rules of a Mutual Marine Insurance Club provided that a certificate should issue to the insured, as evidence of the contract, and security should be given for the vessels proportion of losses. Where neither rule was conformed to by the assured—

*Held*—The want of a certificate was the default of the club, and could not invalidate the contract previously subsisting.

The security could only be lawfully demanded when the vessel was entered for insurance; that not having been done, any demand for it after was unauthorized by the rules of the club.

THIS action was brought to recover from the defendants their proportion of insurance on a vessel of the plaintiffs called the *Mary and Annie*, alleged to have been insured in the Mutual Marine Insurance Club of Conception Bay, in May, 1870, and the plaintiff's case was that the vessel, whilst so insured, in the month of November of last year, proceeded on a voyage from Carbonear to Bonne Bay in this island; that afterwards, on the 16th day of the same month, in consequence of adverse winds and thick snowy weather, she put into Indian Bay, from whence she again sailed about ten o'clock, p. m., of that day, and early on the following morning, whilst proceeding on her voyage, she struck against a piece of ice, which stove in her port bow, and she soon afterwards sunk and became a total loss.

This case was tried before the Court, at the request of the parties, without the intervention of a jury, and it was contended on the part of the defendants—

1st—That the vessel was never insured, because a certificate, which it was urged was the only evidence of a subsisting contract, was not issued in accordance with the 7th rule of the club, and because security was not given by the plaintiffs for the vessel's proportion of losses that might occur, as required by the 18th rule of the club.

2ndly—That the loss of the vessel arose from the barratry of the masters and mariners.

Having given full consideration to the evidence and arguments on both sides, and the objections urged on the part of the defendants against the plaintiffs' claim, we are of opinion that the latter are entitled to a verdict.

They were competent to be members of the club; they signed the rules and entered the vessel in the usual way, and

did what was necessary to be done under the rules; were accepted by the club through the secretary and surveyors, and nothing remained to be done to constitute them partners in the Association.

The want of a certificate was the default of the club, and could not invalidate the contract previously subsisting; the certificate under the rules being, not like an ordinary policy, the contract itself, but mere evidence of a contract which could be proved by other means.

The objection that the plaintiffs were not members, and, therefore, not insured because they failed in giving security, is not sustainable. If security had been lawfully required, the acts of the secretary seem an acceptance of the security proven to have been tendered, but it could only be lawfully required at the entry of the vessel, at which time it was not demanded—and the act of the committee in directing, in July, that security should be required, and the act of the secretary in demanding it in the fall were alike, unauthorized by the rules.

Upon the plea of barratry the evidence fails in bringing home to the plaintiffs that fraud which alone would avoid or defeat the contract. There doubtless, was reason for suspicion, quite sufficient to justify the underwriters in refusing to pay the claim until the circumstances under which it was made had been thoroughly investigated, but after hearing the case twice tried, that is, in the present and a former action, we are of opinion that there is no sufficient proof that the vessel was unfairly dealt with, or that the loss was one upon which the plaintiffs would not be entitled to recover, to justify us in arriving at any other conclusion than we have.

The evidence of the defendant John Maddock, we have not received, as fixing a liability on himself in this case, the real defendants being the whole body of underwriters.

*Mr. Whiteway, Q. C., and Mr. Kent, for plaintiffs.*

*Mr. Carter, Q. C., and Mr. Pinsent, Q. C., for defendants.*

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1873, July. HON. MR. JUSTICE ROBINSON.

*Shipping—Merchants' Shipping Act—Transfer of ships—Representatives of deceased owners joining in transfer—Attachment of ship for equitable interest.*

Under the Merchants' Shipping Act, 1854, the owners of a ship named in the register are to be the only owners recognized by law, and the representatives of deceased owners are not allowed to appear on such register or to join with the survivors in any bill of sale.

A party with an equitable interest in a ship cannot take the corpus of the ship by attachment out of the possession of the legal owner to satisfy the interest.

THIS matter comes before the Court upon a special case.

It is sufficient, for the purpose of shewing the reason of my decision, merely to state that the plaintiff sues the defendant for attaching the brig *Louisa* in a suit between Mr. Dickinson, plaintiff, and Mrs. Lucinda Bartlett, administratrix of William Bartlett, and Isaac Bartlett, defendants; that William in his life time was joint owner with Isaac of the *Louisa*, and Isaac survived William; that Isaac, as survivor, conveyed to Mr. Goodfellow, the said vessel in its entirety; and that, subsequently to such conveyance, the sheriff attached her at the instance of Mr. Dickinson, for which act the said sheriff is now sued.

The determination of the present case must depend upon two questions:

*First*,—Was the *Louisa* properly conveyed to Goodfellow by the surviving owner, Isaac, without the conjunction of the representatives of the deceased owner, William?

*Second*,—Supposing such conveyance was valid, was the sheriff, nevertheless, justified in attaching the brig because Lucinda Bartlett had an equitable claim upon Isaac Bartlett for the interest she might have in relation to her deceased husband's share in the vessel.

Both these questions must, in my opinion, be answered in the negative, and judgment should be entered for the plaintiff for nominal damages.

Mr. Pinsent took the position and supported it ably, that, for the benefit of commerce, chattels property employed in co-partnership is deemed to be held by each partner as tenants in common; that each one's share descends on death to his representatives; and that such doctrine applies equally to ships as to other chattels; but the latter position is not now tenable, by reason of the Merchant Shipping Act of 1854, which altered

the pre-existing law. The object of that statute was to simplify the transfer of shipping. The owners named in the register are to be the only owners recognized in law; and the representatives of deceased owners are not allowed to appear on such register, or to join with the survivors in any bill of sale.

The 37th section expressly enacts that all owners of vessels shall be deemed "*joint owners*," and shall be considered "*as one person*." They are not therefore tenants in common to hold severally, but joint tenants with the necessary incident of survivorship; and on the death of one, the whole legal estate remains in the survivor. The consequence is that Isaac's conveyance was valid, and passed the whole vessel to Goodfellow.

*Second*.—Whatever equitable interest the widow of William Bartlett might have in the vessel or in the proceeds of her sale, could not effectually or legally be reached by taking the corpus of the ship by attachment out of the possession of the legal owner; her remedy was either by a bill in equity, or, if under our attachment law, by laying a warrant in the hands of the garnishee to affect him with notice of the equitable claim.

The 24th section of the Practice Act, which confers the right of attaching "equitable interest" points to the mode by which that right is to be exercised, and to the method by which that interest can be ascertained, viz.: by examining the garnishee.

*Mr. McNeilly* for plaintiff.

*Mr. Pinsent, Q. C.*, for defendant.

## WEBBEE, ADMR., v. MANSFIELD.

1873, *July*. HON. SIR H. HOYLES, C. J.

*Practice—Possession of locus in quo by one of next of kin—Trespass—Right of administrator to sue in his own name for trespass.*

Even when one of the next of kin has entered thirteen years before the trespass complained of was committed, and held possession under a partition verbally made of the locus in quo; this does not constitute the right to sue for trespass, the action must be taken in the name of the administrator.

It appeared that about twelve or thirteen years before the trespass complained of, one Mrs. Adams had entered part of

the estate which plaintiff represented and continued in possession of locus in quo under a partition verbally made of the property of the deceased by the next of kin of whom Mrs. Adams was one.

The partition was with the tacit acquiescence of the plaintiff, but there was no writing of any kind from him confirming it.

The action was brought at the instance of Mrs. Adams, and the defendant contends that it should have been brought in her name as the plaintiff, but in this opinion we are unable to concur.

The legal title to the land (a chattel real) being in the plaintiff as administrator, would not by reason of the *third* section of the Statute of Frauds pass from him to Mrs. Adams without writing, and she having but a bare possession (though with consent of the owner) would hold either as tenant at will to him or—under that section of the last Statute of Limitations which terminates estates at will on the expiration of a year—adversely.

If adversely, she, not having been in possession twenty years, could not, except under special circumstances not here existing, maintain ejectment, the *prima facie* case arising from mere possession being liable to be rebutted by the defendant, shewing title outstanding in the administrator.

If, on the other hand, she held as tenant at will, her estate was at an end when the plaintiff, by instituting this action, particularly with her consent, determined his will and shewed his intention to resume possession and although a demand of possession would be necessary before the plaintiff could maintain the action against his tenant no such notice would be required against the defendant a mere wrongdoer.

The title therefore never having passed out of the plaintiff, and he having also as against the defendant the right of immediate possession, he was the proper person to bring the action.

Whether Mrs. Adams might not herself have maintained the action had not her tenancy (if any) been determined, it is not necessary to consider.

She could sustain no damage by the administrator being plaintiff, as he would recover the land for her, and could be compelled to execute an assignment of it in her favor.

The rule must be discharged.

1873, *July*. HON. MR. JUSTICE ROBINSON.

*Practice—New trial—Misdirection—Nondirection—Contrary to evidence—Trespass—Shooting a dog—“At large without the owner or other person in charge.”*

Where the Court was of opinion that the preponderance of evidence was in favor of defendant, and the jury had found a verdict for the plaintiff they refused to overrule the decision of the jury within whose province the determination of matters of fact lay.

THIS case was tried before me last Term, and resulted in a verdict for the plaintiff for \$8.

I granted a *rule nisi* returnable into the Supreme Court to set aside that verdict upon the grounds of misdirection, of nondirection, and of being contrary to evidence.

The rule has been argued before the three judges, and after full consideration we have arrived at the conclusion that the verdict should not be disturbed.

The action was brought to recover damages against the defendant for shooting the plaintiff's dog.

The defence was that the dog was at large and without its owner or other person in charge, and was not licensed and collared as the law directed.

It appeared that the plaintiff had paid for a license for the dog, and received a certificate from the Magistrate, but the certificate purporting to have been issued under a repealed statute, and not being in accordance with the existing law was not received in evidence; the irregularity in the license, however, was of no practical importance, because the plaintiff had neglected to keep a collar properly engraved around the dog's neck, which collar is, in the opinion of all the judges, essential to the efficacy of a license.

The main question that remained in the case, was whether, under the evidence, the dog was, at the time it was shot, “at large without the owner or other person in charge” of it.

Upon that point there was a conflict of evidence which was left to the jury, and although in our opinion the preponderance leant rather in favor of the defendant than of the plaintiff, we do not feel justified in overruling the decision of the jury within whose province the determination of matters of fact lay, especially where the verdict involved so small a sum as \$8.

The judges are of opinion that there was not any error in the manner in which I left the case to the jury, either as regards misdirection or nondirection, but whilst they will not disturb

the verdict they desire to express their opinion that the defendant being a Police Constable, was obliged at the peril of losing his situation to carry into effect the provisions of an Act, beneficial no doubt but not always easy to execute, that he had reasonable grounds for believing that the plaintiff's dog was liable to be shot, and that he had honestly intended to discharge his duty; therefore they hope that the Executive Government may see fit to indemnify him against the expenses he will have incurred by reason of the verdict.

*Mr. McNeilly* for the plaintiff.

*Mr. Pinsent, Q. C.*, for the defendant.

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*Held*—The order being an inland Bill of Exchange, and the acceptance not being in writing, was not binding on the chairman of the Board.

*Held*—The order did not operate as an equitable assignment. In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund, and there must be funds at the time the order was drawn. *In re O'Grady's Insolvency* ... ..

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*Held*—A bond executed in blank and left to be filled in by another who has no authority under seal is void at law ;

*Held*—That authority under seal would not be necessary to fill in the blanks in a bond if from all the circumstances a general authority to do so could be gathered, and in a case where the maker of the bond had himself sealed the bond ;

*Held*—If a party sign a bond to which no seal is affixed, and the blanks in the bond be afterwards filled in without any authority from the maker, the latter is not liable. *Queen v. Molloy* ... .. 84

*Custom House Bond—Execution of—Practices in—Usage of trade in—Authority to sign—Subsequent ratification—Practices—Rule nisi for new trial.*

In an action upon a Custom House bond to recover from the maker the sum named in the bond (being the amount of duties payable by the party for whose accommodation the bond was made, and for whom the maker became surety), it appeared that the signature and seal of the maker was affixed to the bond binding him to the Queen for the penalty in the bond. The defence set up was—(1) *non est factum*, and (2) a special plea to the effect that the maker did not seal and deliver the bond, that after signing it the amount of the bond and several additions were inserted in the same, and these alterations were made without his assent or authority. The jury found for the defendant. On a rule nisi for a new trial,—

*Held*—By Little, J., (Robinson, J., differing), a blank bond or deed is not valid to bind a party when the same has been filled up after signing without subsequent assent or confirmation.

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*Held*—The company was under no obligation to cause the bonds of sureties for shareholders to be renewed year by year. Such bonds were operative beyond one year. The power with which the company is invested to call for a renewal of the bonds is permissive not compulsory. *Nfld. Marine Insurance Company v. Sclater* ... .. 111

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It is no answer to the claim for rates as a consumer that the building occupied is a store, and neither a house or premises within the meaning of the Acts. Every building, except churches, within two hundred yards of the main pipe of the Company, and into which a service pipe has been introduced, is liable to a water rate.

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On a trial for wilful murder the prisoner, whose defence was insanity, was found guilty. Subsequently, on a motion for a new trial, it was contended in argument amongst other grounds that the jury lists prescribed by the Jury Act had not been prepared conformably with the statute. This was admitted by the Attorney General. On the same argument it was admitted that the evidence established against the prisoner the fact of homicide. Without giving any decision on the point raised in the argument, the judges, in a letter addressed to His Excellency the Governor, recommended that it was a case for the exercise of the Royal prerogative. His Excellency accordingly having taken the matter into consideration, in the presence of his Executive Council and the Judges of the Supreme Court, approved of the same, and the prisoner was accordingly sentenced to confinement in the Lunatic Asylum during Her Majesty's pleasure. *Queen v. Carew* ... .. 1

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On an application for a writ of Prohibition against certain persons professing to be a committee of the House of Assembly for the trial of a controverted election under 23 Vic. cap. 11 (the local Act for the trial of controverted elections), it appeared that certain alterations had been made in the journals of the House of Assembly by the clerk under direction from an improperly assumed authority, relative to the period of its adjournment, which alterations stated facts which were admitted to be false, and the truth or falseness of which facts were important as regards the validity of the election committee and its work. On the examination of the clerk of the Assembly, it was proposed to ask him (1), why the alteration in the journal was made, and for what purpose? (2), Who desired the alteration made?

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## EXECUTOR—

*Accounts of—Master's report on—Exceptions to.*

The Court will not countenance the idea that an accounting on the part of an executor ought to conclude, or even embarrass in any respect the rights of parties interested in the bequests of the testator. *In re Parker's Estate ...*

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*Incapacity of—Petition by next of kin for removal of executor and appointment of receiver.*

Where an executor was from bodily health incapacitated from attending to the duties of the estate, the Court, on the petition of the widow of the testator, with the consent of the testator's children, referred the matter to the master to appoint a fit and proper person as receiver of the estate. *In re Estate Thomas Parker ...*

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*Irregularity in accounts and management of assets—Master's report—Petitioner's costs.*

In consequence of the unsatisfactory manner in which the estate had been managed and the accounts of the same kept, showing irregularities in the investment of the assets of the estate, which necessitated proceedings before the Court, the executor was ordered to pay the taxed costs of the petitioner or plaintiff out of his private estate. *Parker v. Simms ...*

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## EXECUTOR—Continued.

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*Refusal to produce books of estate—Unsatisfactory accounting—Absence from colony—Injunction to restrain Receiver General from paying executor his pension, and executor from selling his property.*

Notwithstanding the executor had refused to produce before the master any books of account of an estate he had managed for years, the unsatisfactory character of his accounting, his absence from the colony, and his producing mortgages as assets of the estate made to himself, the Court refused to grant an injunction to restrain the Receiver General from paying the executor his pension or to restrain the executor from selling his property, on the grounds that bail might have been obtained from him under the process of *ne exeat regno*. *In re Parker's Estate* ... ..

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FALSE PRETENCES. *See* INSOLVENCY.

FALSE STATEMENTS. *See* INSOLVENCY.

FRAUD. *See* INSOLVENCY.

FREIGHT OF PLANTER'S SUPPLIES TO LABRADOR,  
LIABILITY OF RECEIVER OF VOYAGE FOR. *See*  
MASTER AND SERVANT.

GOVERNMENT AGENT, PERSONAL LIABILITY OF.  
*See* AGENCY.

## GRAND JURY—

*Preferring second indictment for same offence against same party same term—Omitting to examine witnesses—Number necessary to ignore bill.*

Where a Grand Jury has ignored a bill the Court will not permit a second bill of a like nature to be presented to them at the same term. *Queen v. Burton*... ..

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## INCOMPLETE GIFT—

*Parol evidence of trust—Onus probandi—Conflicting testimony.*

For several years previous to 1866, complainant's deceased wife and her sister resided with their aunt, one Mrs. O'Brien. In July, 1866, Mr. O'Brien, after informing his wife he intended making her nieces a present, called them and delivered to each a government debenture for £500 sterling, bearing interest at 5 per cent. per annum, writing their names in pencil in the corner of their respective debentures. On the same day Mr. O'Brien took his nieces to the Receiver General's office, where upon presenting their debentures a half year's interest was paid to each. The debentures remained in the possession of the nieces for three years, when they were handed back to Mr. O'Brien for safe-keeping. One half the interest for two con-

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## INCOMPLETE GIFT—*Continued.*

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secutive half years was paid to the nieces by Mr. O'Brien, but after this no further payment was made to them, and in 1868 Mr. O'Brien without consulting his nieces sold the debentures.

On a bill filed by one of the nieces to establish an alleged trust—

*Held*—Under the circumstances there had been no gift to or valid declaration of trust for the nieces. The transaction between the parties was a mere bailment of the documents, and no trust of the fund was or could be created by it.

*Held*—There was a trust created for the interest received, or which might have been received on the debentures. *Reddin, Admr., v. Stafford, Ex.* ... ..

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## INCORPORATION OF COMPANY, PROOF OF, WHEN LAID IN INDICTMENT. *See* CRIMINAL LAW.

## INDICTMENT. *See* CRIMINAL LAW.

## INDICTMENT, SECOND, SAME TERM. *See* GRAND JURY.

## INFANT—

*Estate of—Voluntary maintenance of infant—Right of guardian to appropriate cost of infant's maintenance from infant's estate.*

When the father of a child impliedly concurred in the appropriation of the interest of the child's funds to her maintenance, he himself benefiting by this appropriation in being relieved of the burden of her support, the Court refused to permit such money to be recovered back as money misappropriated. *McCarthy, Admr. v. Greene, Admr.* ... ..

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## INFRINGEMENT OF PATENT. *See* PATENT.

## INJUNCTION. *See* PRACTICE AND CONTRACT.

## INLAND BILL OF EXCHANGE. *See* BILL OF EXCHANGE.

## INSOLVENCY—

*Insolvency Act—Obtaining credit without means of paying—Appropriation of voyage for benefit of self—Failure to account to partner—Concealing property from creditors.*

When the insolvent expended the balance of the monies obtained by him for the sale of bait upon the purchase of provisions for himself and family, without any regard to his pledge to pay for a seine obtained from his supplier,—

*Held*—Such an expenditure was a dishonest act, a fraudulent misappropriation of his assets, rendering the insolvent liable to imprisonment under the Insolvency Act. *In re Insolvency of M. Wall* ... ..

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25 Vic., cap. 7, sec. 7—*Fraud—Keeping false accounts—Breach of trust—False pretences—False statements—Withholding books of account.*

Where on the examination of the petitioners, who had voluntarily come before the Court praying that they might be declared insolvent, it appeared from their own examination and the examination of witnesses called who were creditors, that petitioners had (a) kept false books of account; (b) fraudulently withheld certain entries from their books of account; (c) willfully destroyed their books of account; (d) withheld at their examination books of account and papers; (e) contracted debts by breach of trust and false pretences. They were declared insolvent, but on motion on behalf of creditors they were adjudged liable to punishment and committed to prison for fraud. *In re Insolvency of J. & M. Power* ... .. 11

25 Vic., cap. 7—*Fraud—Undue preference.*

The penal provisions of the Insolvency Act ought not to be applied when the culpability of the act and of the intent is open to a reasonable doubt. *In re Insolvency of John Collins, jr.* 217

*Fraud.*

Upon the examination of the insolvent it was apparent that several fraudulent acts had been committed by him, notwithstanding which the Court suggested the advisability of making a compromise with his creditors, which he having failed to effect, sentenced him to imprisonment under the penal provisions of the Insolvency Act. *Hann v. Tobin* ... .. 219

*Fraud—False pretences—"Probable expectation of being able to pay"—Insolvent vexatiously defending suit.*

To convict a party under the Insolvency law and to sentence him to imprisonment, his crime must be proved so clearly as to exclude all reasonable doubt of his innocence.

It is not every default in a debtor to pay his debts that will render him a criminal in the eye of the law and amenable to penal imprisonment.

If creditors think proper to encourage debtors in recklessly running into debt the Court will not punish the debtor, who is guilty of no other misconduct than failing to pay.

A debtor who merely gives bail in a suit to release his person from arrest preparatory to his petitioning for a declaration of insolvency, whereby all his creditors may be equally benefitted, cannot be said "vexatiously" to defend a suit within the meaning of the Act. *In re Insolvency Geo. E. Wilson* ... .. 473

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### *Mortgage—Notice of Insolvency.*

A mortgage given fourteen days before a declaration of insolvency to secure a pre-existing debt is valid when the mortgagee was not aware and had no notice of the insolvent condition of the mortgagor. *In re Insolvent Estate of Mudge & Co.* ... .. 104

*Preferential claims—Sharemen of dealers who themselves are dealers of insolvents—Skinners, carters and cullers—Sealers' share of sealing voyage—Servants hired without knowledge of insolvents.*

The term "servants," under the 22nd section of the Insolvency Act, includes skimmers, cullers, and all persons who render personal service on the trading establishment of insolvents, and under insolvency are entitled to be paid in full the balances due them for the current year. This would not, however, include amounts due carters, which are made up of hire and uses of horses and carts, and cannot be considered as servants' wages. *In re Insolvency of Ridley & Sons* ... .. 351

*Trustees' Commission—Principle upon which trustees' commission is based—Right of trustee to charge brokerage.*

A trustee in insolvency is entitled to a commission, not merely on the proceeds of goods of the insolvent estate sold by him, but also on property of any description of an ascertainable value which by his care and labor he has secured and made available for the benefit of the creditors, and as to which he has incurred responsibility. He is not (*e. g.*) entitled to commission on bank shares held under a lien by third parties for their full value, nor on landed or other property in which under the vesting order the title is in him, and which by reason of a deed of composition with creditors is re-conveyed by the trustee to the insolvent.

A trustee is not permitted to charge for his services as broker in any matter connected with his office. *In the Insolvency of Ridley & Sons* ... .. 456

### *Trustee in—Erroneous payment by—Liability of.*

Where the trustee in insolvency paid a claim believing it was preferential, and it appeared from the schedule sworn to in Court that it was, the Court refused to make an order holding the trustee liable in his own estate for such error. *In re Foley's Insolvency* ... .. 166

*25 Vic., cap. 7, sec. 22—Servant's wages, arrears of, how far preferential—Currency of year.*

On the insolvency of the master in the month of February, a servant claimed to be paid in full a balance due him as wages for the year terminating in the September preceding the insol-

## INSURANCE—Continued.

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either on a rock or on a projecting spur from an iceberg (which itself was aground on some rocks and shoals out in the sea), during the continuance of a very thick snow storm, and there remained between one-quarter and half an hour. Whilst so lying she came in contact with the iceberg, and was thereby greatly injured. She was, however, afterwards brought safely into port.

*Held*—That this was a stranding within the meaning of that word in the policy and rules of the Club. *Warren v. Cummins* 104

*Time policy—Insurance for voyage only—Warranty of seaworthiness.*

In a policy of insurance effected for a voyage the law implies a warranty on the part of the assured, which amounts to a positive undertaking that the vessel, at the commencement of the voyage, is seaworthy. But this rule does not extend to a time policy. *White v. Newfoundland Marine Insurance Co.* ... 27

*Marine—Risk—Constructive loading.*

Action on a policy of insurance of and upon any kind of goods and merchandize in and upon the schooner *Mary Ann*, beginning the adventure from the loading of the goods on board the said schooner at St. John's, and so to continue, &c., &c., with permission to call at Carbonear and take in crew and goods. The schooner was lost on the voyage, having taken in goods at St. John's and Carbonear.

The declaration claimed for a total loss of the goods shipped at both places.

*Held*—The words "beginning the adventure on the loading of the said goods at St. John's" did not limit the risk to the goods so laden, but covered those laden at the other port.—*Taylor et al v. Union Marine Insurance Co.* ... 368

*Marine—Seaworthiness—Beginning of adventure—Total loss—Practice—Rule nisi—New trial.*

Where a vessel, laying in the harbor taking in her cargo, without apparent cause became leaky, founders without encountering any extraordinary peril or other visible cause to produce such effect; this is strong presumptive evidence that she was not seaworthy when the cargo was placed in her.

It is a warranty precedent implied in every voyage policy that the ship in which the goods are insured, should at the lading of the goods on board be seaworthy for the voyage. It lies upon the plaintiff in every case to show that this condition has been fulfilled. *Rogerson v. Union Marine Insurance Co.* ... 359

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*Insurance Club rules—Construction of—Certificate—Security—Barratry.*

The rules of a Mutual Marine Insurance Club provided that a certificate should issue to the insured, as evidence of the contract, and security should be given for the vessel's proportion of losses. Where neither rule was conformed to by the assured,

*Held*—The want of a certificate was the default of the club, and could not invalidate the contract previously subsisting.

The security could only be lawfully demanded when the vessel was entered for insurance ; that not having been done, any demand for it after was unauthorized by the rules of the club. *Taylor v. Maddock* ... .. 510

INTEREST—Mortgage silent as to. *See* MORTGAGE.

INTERPLEADER. *See* BILL OF EXCHANGE.

JETTISONED CARGO. *See* INSURANCE.

JUDGMENT BY DEFAULT. *See* COSTS.

JURORS—RIGHT OF PRISONER TO HAVE WHOLE PANEL IN COURT. *See* CRIMINAL LAW.

GRAND JURY—OMITTING TO EXAMINE WITNESSES.

JURY, GRAND — PREFERRING SECOND INDICTMENT SAME TERM.

JURY LISTS—IRREGULARITY IN TAKING. *See* CRIMINAL LAW.

LABRADOR TRADE, USAGE AS TO PAYMENT OF FREIGHT TO. *See* MASTER AND SERVANT.

LANDLORD AND TENANT—

*Attachment—Distress—Insolvency of tenant—Priority of landlord—Servants' wages.*

On the 8th of September, A. D. 1865, the furniture and goods of the tenant were seized under an attachment. On the 25th of November following the landlord distrained for his rent then due on the same furniture and goods as attached ; no sale took place by the landlord, but he continued in possession until the 9th of December, when the tenant was declared insolvent. It was contended on behalf of the servants of the insolvent that the proceeds of the distress should be applied to the discharge of the servants' wages, on the ground that the lien of the landlord was discharged by his not selling within the prescribed time.

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*Held*—That the distress was not superseded by the insolvency law nor rendered void by the delay in perfecting it, inasmuch as the delay was with the consent of the tenant, and if there had been no such consent, the distress would not be void but only irregular. *In re Insolvency David Bulger* ... ... 207

*Right of landlord to distrain on chattels of tenant on premises after declaration of insolvency—25th Vic., cap. 7.*

On the 11th day of March the insolvents filed their petition for insolvency, and on the 22nd of the same month were declared insolvent and their property invested in a trustee. On the 29th of the same month the landlord of insolvents distrained on the chattels on the premises of the insolvents for one half year's rent due on the 31st of the previous October. At the time of the distraint the trustee in insolvency had removed part and was removing the residue of the said chattels. On a case stated for the opinion of the Court,

*Held*—A landlord who distrains subsequent to the issuing of the order vesting the insolvent's estate in trustees, acquires no title to the goods so distrained. *Walbank, Trustee, v. Knight* . 235

*Lease, Covenant, retrospective operation of—Practice—Demurrer.*

Prior to 1849 the relation of landlord and tenant existed between the plaintiff and defendant. In that year a formal demise was executed, in which the land leased was described by metes and bounds for a term of 50 years from 1846, at a rental of £100 stg. per year. Whilst the land so defined in lease was in occupancy of tenants, and prior to the execution of a lease, a portion was taken by the Crown for street widening, for which the landlord received as compensation £320 stg. The tenants being sued for the rent for a whole year claimed for a proportionate reduction, pursuant to a proviso or covenant in the lease, as follows: "If at any time during the term hereby granted, any part of the premises hereby leased shall be taken by H. M. Government for the widening of streets and the said landlord be remunerated for the same, a deduction is to be made from the aforesaid rent proportioned to the amount of such remuneration." To this claim or plea the plaintiff replied that the remuneration awarded by the government was for land taken previous to the execution of the lease and the making of the said covenant. To which replication the defendants demurred as setting up no legal answer.

*Held*—(Hoyles, C. J., differing), sustaining the demurrer—The covenant applies to a breach prior to as well as subsequent to the execution of the lease. *Clapp, Admr., v. Rendell et al.* ... 461

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## MASTER AND SERVANT—

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*Assignment of mercantile business—Liability of assignees for wages due servants by assignor.*

An assignee of a business concern consisting of a house of trade and supplying business, incurs no liability in taking over the servants of the assignor for wages, due by the assignor to such servants. *Robinson et al v. Ridley et al* ... 246

*Wrongful dismissal—Agreement for one year—Damages.*

The plaintiff entered on his services as a clerk for one year from January 1st, and was discharged without cause on the 7th of February following. It appeared he might have continued in the service at a reduced rate of wages. In an action for damages,

*Held*—Where one party to an agreement declares his intention not to fulfil his side of it the other party may regard such declaration an absolute breach and at once sue for damages.—If a servant is hired for the year and during the year dismissed without cause, he is entitled to his wages to the end of the year. *Berney v. O'Brien & Co.* ... 260

*Planter—Servants' wages—21 Vic., cap. 9, sec. 5—Appropriation of.*

A planter instructed his supplying merchant to pay his servant the balance of his wages. This was done partly by cash and the balance by an order for goods on the merchant's store, the servant giving a receipt in full. The servant mislaid the order, and the merchant refused payment till production or until a month had elapsed to enable the order to be found. The servant sued the merchant for the balance due on the order, and it was contended that he was entitled to be paid in cash by virtue of 21 Vic., cap. 9, and that the refusal to deliver the goods without the order was a breach of contract.

*Held*—The provisions of 21 Vic., cap. 9, only apply to masters and servants, and not to third parties who are not privy to the original contract. There was no breach of contract in refusing the goods without production of the order or proof of destruction. Either was a condition precedent to obtaining the goods. *Grace v. Rutherford Bros.* ... 214

## MERCHANT AND PLANTER—

*Freight of planters and their supplies to Labrador—Liability of merchant as receiver of voyage for freight to ship-owner—Usage of Labrador trade—Basis upon which freight is fixed.*

A supplying merchant who receives the produce of the voyage with a knowledge that freight is due upon it and that he is to pay it to the ship-owner, even though the planter should withhold his consent to such payment, is liable for the freight.

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The usage of the Labrador trade as regards the freighting of planters and their supplies is that the ship-owner is bound to bring back as well as to take down to Labrador the freighter and his effects. If the ship-owner is prevented by the act of God from bringing the parties back then only a *pro rata* freight would be payable to the ship-owner in proportion to the benefit conferred on the planter. *Ross v. Hanrahan* ... 242

MISDIRECTION. *See* PRACTICE.

## MISREPRESENTATION—

*Imperial Statute 9 Geo. 4, cap. 14, sec. 6—Construction of—Misrepresentation, what is necessary to establish—Practice—Injunction to stay proceedings where monies paid on false representation.*

In an action against the defendant for representing that "A" had been granted letters of administration to the estate of her late husband, whereby a bank holding monies of the said deceased was induced to pay over the same to "A," whereas the defendant, at the time he made such representation, knew the administration had not been granted by reason of the bonds required for same not having been perfected; it appeared at the trial that the written representation relied on was the defendant's writing the name of "A" as administratrix on a receipt given to the bank for such money and signing his own name as witness.

*Held—*(Hayward, J., differing). Such a writing was sufficient to satisfy the statute 9 Geo. 4, cap. 14, sec. 6, which declares that no action shall lie to charge any person upon or by reason of any representation made or given relating to the character, conduct or ability, &c., &c., of any person to the intent that such person may obtain money thereupon unless such representation be made in writing signed by the party to be charged therewith; but that, as it appeared from the evidence that the representation was not made with the "intent" required by the statute, and as it also appeared that the bank acted on the verbal statement of the defendant in paying the money made previous to the giving of the written misrepresentation and was not substantially induced by the same, the case was not one coming within the meaning 9 Geo. 4, cap. 14, section 6. *Union Bank v. Walbank, Admr.* ... 490

MISTAKE. *See* CONTRACT.

## MORTGAGE—

*Interest—Dealing account—Foreclosure mortgage silent as to interest—Obligation of mortgagee in possession.*

A planter, to increase the security of a merchant for advances for the fishery, gave him a mortgage on his land. In

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## MORTGAGE—*Continued.*

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an action seeking a foreclosure, the merchant claimed interest under the mortgage though the instrument contained no covenant for interest.

*Held*—No interest was chargeable. The mortgage was given to secure the balance of a planter's account. Such balances, unless by express agreement, carry no interest. Mortgages follow the nature of the debt. *McBride v. Collins* ... 221

MORTGAGE, NOTICE OF. *See* INSOLVENCY.

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NON-SUIT, WHEN A PLAINTIFF MAY BE NON-SUITED.  
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OWNERSHIP, BONA FIDE. *See* INSURANCE.

PARDON IN CRIMINAL CASES. *See* CROWN.

PARTIAL LOSS. *See* INSURANCE.

## PARTNERSHIP—ARTICLES OF

*Will—Capital left in Concern—Insolvency—Debt—Proof.*

The testator, who was a member of a co-partnership, died in the year A. D. 1862. By his will he desired that all his monies embarked in the partnership concern at his death, should remain in the same, his remaining partners paying interest at the rate of five per cent per annum, the interest to be paid annually to his legatees in the same proportion as their legacies, the principal sum going to the legatees (his daughters) at the end of five years. After his death his executors estimated the monies so left in the business at £28,478 8s. 3d., and interest on this was regularly paid by the surviving partners up to the year 1867, when the firm became insolvent. The executor of the testator claimed to prove on the insolvent estate for the whole of the above amount as an ordinary creditor. The general creditors resisted this on the grounds that the monies were kept in the business for the benefit of the legatees and that they were not entitled to any portion of the fund until the general creditors were paid in full. On a special case stated for the opinion of the Court,

*Held*—The executors were entitled to prove for the whole amount and the legatees are creditors of the estate for their portion of the same and entitled to a rateable dividend on the nett assets of the estate. *In re Insolvency K. McLea & Sons* ... 228

PARTNERSHIP—ARTICLES OF—*Continued.*

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*No agreement—What constitutes a partnership—Evidence necessary to establish a partnership.*

For a great number of years Cornelius O'Donnell and his sister Hannah, wife of John O'Dwyer, resided with their brothers, John O'Donnell, deceased, and assisted in the carrying on of a wine and grocery business. The license was in John's name, as was also the lease of the premises in which the business was carried on. There was no agreement for a partnership, written or verbal. Never any settlement of accounts or division of profits. All the parties lived together, worked for the general support, and, as alleged, contributed money towards the general sustentation of the business. Accounts were produced in evidence for articles had from merchants in the names of all the parties said to be for the general business. John O'Donnell died intestate, and his brother Charles claimed a share in all his property, whilst Cornelius and Hannah claimed two-thirds of the estate belonged to them as partners of deceased.

*Held*—No partnership existed. A partnership cannot be established by the evidence of the partners and their private communications, the fact must be proved *aliunde*. *O'Donnell v. O'Donnell* ... .. 169

PAROL EVIDENCE. *See* EVIDENCE.

## PATENT—

*Invention by servant—Grant of patent to servant—Infringement by master.*

Where a skilled person is employed to make experiments, the result of his labors belongs to his employer, and the adoption and use of the invention by the employer is no infringement where the invention has been patented by the employee. *For v. McKay* ... .. 35

PLANTER. *See* MASTER AND SERVANT.PLEADINGS. *See* PRACTICE.POLICE OFFICER. *See* TRESPASS.POOR COMMISSIONER, AUTHORITY TO BIND GOVERNMENT. *See* PRINCIPAL AND AGENT.

## PRACTICE—

*Appeal—Judges equally divided—Rule for second hearing of cause—Judge previously acting as counsel in case—Appeal to Privy Council where no formal judgment entered—Effect on appeal of judges being divided.*

In an appeal from the judgment of the Central Circuit Court on a special case stated under 12th Vic., cap. 8, sec. 12, upon a

petition of right preferred for alleged arrears of salary due to the appellant as one of the judges of the Supreme Court of Newfoundland, a rule was obtained to set the case down for a second hearing. It appeared that in June, 1862, the appeal was brought on before the Supreme Court and argued, when the judges were equally divided in opinion, Brady, C.J., being for the affirmance of the judgment of the Court below, whilst Little, J., was for the reversing of the same. The Court being thus divided no judgment was entered, and no further proceedings had until the application for a rule for a second hearing. On the argument it was contended for the appellant that no judgment on the former hearing could be entered, and therefore it was the duty of the Court to re-hear the case. Whilst on the part of the Crown it was submitted that the Court as constituted was not competent to entertain the application, one of the judges (Hoyles, C.J.) having been counsel in the case; and further, that the judges having delivered their opinion, though differing, the case had dropped and could not be heard a second time.

*Held*—There is no precedent in which a Court of Common Law, after once hearing a cause and adjudicating upon it finally, as far as such Court could do (the judges being equally divided in opinion), has re-heard the case. The equality between the judges in effect dismissed the appeal and affirmed the judgment of the Court below, inasmuch as by such division the Court virtually refused the motion of the appellant that such judgment should be reversed.

*Held*—The absence of a formal judgment on record will not prevent the judicial committee of the Privy Council from entertaining an appeal.

*Held*—In order to prevent a denial of justice there is nothing to prevent a judge who has taken part in a case as counsel from adjudicating thereon. *Robinson v. Queen* ... .. 118

*Attachment—Warrant—Cheque—Destruction of cheque by garnishee at instance of drawer.*

A warrant of attachment was laid by the plaintiff in the hands of the garnishee (one Marc), who held a cheque drawn in favor of defendant by one Munn. Previous to laying the warrant the defendant had no communication with the garnishee, but shortly after the laying of the warrant he did see the garnishee, who told him he would pay amount of cheque if it had not been attached. Shortly after Munn, disregarding his having drawn the cheque, paid the defendant the amount of it and requested the garnishee to destroy same, which he accordingly did. On a rule nisi for an order on garnishee to pay amount of cheque attached into Court—

*Held*—The cheque was the effects of the defendant in the hand of the garnishee, and therefore liable to attachment. *Byrne v. Nowlan* ... .. 33

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*Contempt of Court—Habeas corpus—Non-production of infant—Attachment—Bail—Rule nisi to discharge.*

On an application for a writ of *habeas corpus* a judgment of the Court was given against the defendant, to the effect that an infant in the custody of the defendant as a mere caretaker, should be restored to its mother. No regard was paid to the judgment and the writ was issued, to which no return was made, and the defendant was adjudged guilty of contempt of Court, and an attachment was issued under which she was held to bail to answer for contempt. On a motion for her discharge from custody it was set up as a sufficient answer for not obeying the writ that the child in the absence of the defendant from her house had been abducted, but after the judgment and after the writ.

*Held*—The disregard and defiance of the judgment of the Court rendered her responsible for the safe-keeping of the child, and in the absence of irresistible force bound her to its production. *In re M. G. James* ... .. 503

*Attachment—Warrants laid under distinct attachments—Same fund—First attachment raised—Position of remaining attachment—Money in custodia legis—Present interest and disposing power—6 Victoria, Cap. 10, Sec. 7.*

A warrant of attachment was on the 17th of November, 1863, laid in the hands of a garnishee at the suit of one Allen against Joy. On the 23rd of December following a like warrant was laid in the hands of the same garnishee by one Jordan against the same defendant. On the 31st of December same year Allen's attachment was raised, and the moneys attached paid over to Joy. It was contended on behalf of Jordan, the party to the second attachment, that the money should be paid into Court to the credit of his suit, that the money was improperly paid over to Joy, in that the moment Allen's attachment was raised his (Jordan's) attachment applied and held the money.

*Held*—That no attachment can operate on or effect any monies, on and over which the defendant shall not have at the time of such attachment *a then present interest and disposing power*. As Joy had not a present interest to dispose of the monies at the time they were attached by Jordan (being then under attachment by Allen), the raising of the attachment by the latter in no way affected the relations of Joy and Jordan. *Jordan v. Joy* ... .. 24

*Pleadings—Demurrer—Insurance—Marine—Time policy—Total loss—Unseaworthiness.*

In an action to recover as upon a total loss the amount underwritten in a time policy, the defendants pleaded "that the loss was occasioned by the unseaworthiness of the vessel, and not by the perils insured against."

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*Held*—On demurrer, the plea was too general and could not be sustained. The necessary facts to sustain such a plea must be specially pleaded. *Meehan v. Union Marine Insurance Co.* 367

*Capias*—*Setting aside*—*Affidavit of debt, sufficiency of*—*Insolvency Act*—*Sufficient averment of official character of trustees.*

In an affidavit of debt upon which a *capias* is founded it is sufficient to aver that the plaintiffs are the trustees of the insolvent estate; there is no necessity to state the particulars of their appointment. *Trustees of Thomas v. Collett* ... 146

*Pleadings*—*Declaration*—*Sufficient ground of action*—*Demurrer*—*Water Company Acts*—*Right of property owners to use of water during the happening of a fire*—*Withholding by company*—*Liability of company.*

The owner of certain dwelling houses in the town of Saint John's sought to recover from the General Water Company the value of houses destroyed by fire, on the grounds that their loss was occasioned by the company depriving him of the use of the company's water during the happening of the fire. The declaration was demurred to on the ground that it disclosed no legal liability.

*Held*—(Overruling the demurrer)—The Fire Brigade, under 26th Vic., cap. 9, at the time of the happening of a fire, have the control of the water supplied to the town of St. John's by the Water Company vested in them and not the Water Company.

The Water Company Acts do not expressly confer the right to the owners of property to the use of the water supplied to the town of St. John's by the Water Company during the happening of a fire, but, in conjunction with the Fire Brigade Act, they give it inferentially. *Wadden v. General Water Co.* 223

*Judgment by default*—*Setting aside of*—*Personal service of writ on defendant*—27 Vic., cap. 12—27 Vic., cap. 9, sec. 30.

On an application to set aside a judgment signed in default of appearance under the 30th section of the Practice Act, 27th Victoria, cap. 9, an affidavit stating the precise nature of the defence is not required, but the ordinary affidavit of merit is sufficient.

Personal service on a defendant of a writ is not necessary in order to sign judgment by default. The service on the defendant's attorney is sufficient to bind the defendant and to satisfy the statute. *Baird et al v. O'Neil et al* ... 279

*Pleadings*—*Sett-off*—*Demurrer.*

A, a merchant, employed B, a broker, for certain commission to be paid to him in that behalf to sell for A a certain quantity

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of fish, on the terms that B should sell the fish and place the proceeds of same in a bank to the credit of A, all of which B promised to do. B sold the fish, received the proceeds, but did not place same to the credit of A but converted them to his own use. In an action for the proceeds of the sale B pleaded a set-off; to which A demurred.

*Held*—(Hoyles, C. J., differing). That in such an action a set-off was admissible. In all actions of *indebitatus assumpsit* a set-off may be pleaded. A set-off may be pleaded to such portions of a declaration in *special assumpsit* as clearly claim a liquidated sum such as might be recovered on an action of *indebitatus assumpsit*. *Rutherford v. Dickenson* ... 382

*New trial—Misdirection—Obstruction of access to wharf from harbor—Public nuisance.*

Where in an action for damages for obstruction of access to wharf from the waters of the harbor, the presiding judge directed the jury "that as from the evidence it appeared the plaintiff did himself (some years previous to the date of the alleged trespass), by extending his wharf, obstruct the access to his premises, and if they believed that he thereby substantially contributed to the injuries done to his premises by the subsequent acts of the defendants, that would be a good ground of defence." Upon a rule for a new trial—

*Held*—(Robinson, J., differing). Such direction was wrong in point of law.

A private individual cannot justify an injury to property in the possession and enjoyment of another upon the mere ground that such property was a public nuisance. *McLoughlan v. Martin* ... 44

*Habeas corpus—Conviction for contempt in disobedience of—Imprisonment—Release of prisoner.*

Where after the prisoner, who had been committed for contempt in disobeying a writ of *habeas corpus* to bring the body of a child before the Court in her possession when the writ was issued, had served six months' imprisonment and had not delivered up the child, the Court were of opinion that the ends of justice were satisfied and released the prisoner. *In re M. G. James* ... 508

*Rule nisi for new trial—Judges equally divided, effect of—Practice for junior judge in such cases.*

On the argument on a *rule nisi* for a new trial, where the judges were equally divided (there being only two present at the hearing, the Chief Justice, Sir H. Hoyles, having been engaged in the case as counsel when at the bar), the legal effect

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under the authorities was held to be (Robinson, J., differing,) that the defendant was entitled to hold his verdict and sign judgment. *Queen v. Molloy* ... .. 124

*New trial—Contract—Shipping—Damages—Verdict—Rule nisi—Improper admission of evidence—Misdirection—Excessive damages.*

The rule on which a new trial should not be granted on the grounds that secondary evidence was permitted to be given of the contents of a written document, no sufficient notice to produce the document having been given, is, where it is clear beyond a doubt that the objectionable evidence did not weigh with the jury in forming their opinion. *Shea v. Portulance* ... 171

*New trial—Misdirection—Rule nisi.*

The refraining of the judge from laying before the jury certain legal principles, which under ordinary circumstances a jury could not fail to recognise themselves even though not reminded, is not a misdirection, and, consequently, no ground to set aside a verdict. *Ryan v. Portulance*... .. 175

*New trial—Shipping—Denise of ship—What amounts to—Priority of charter party to bill of lading—Contract of affreightment—Liability of owner of ship for damage to cargo.*

A shipper entered into a charter party with the owner of a vessel to carry butter from Boston, in the United States of America, to St. John's, Newfoundland. On the voyage a wilful and unnecessary deviation was made, by reason of which the butter deteriorated, and in an action against the owners of the ship the shipper claimed as damages the difference between what the butter realized and what it would have fetched if it had arrived according to the ordinary course of the voyage. The jury found for the plaintiff shipper. The defence set up was that on the voyage in question the vessel had been chartered to one Melledge, of Boston, and consequently the charterer and not the owner was liable. On a rule for a new trial,—

*Held*—Discharging the rule (Robinson, J., differing).—The owners of a ship for whose benefit she is navigated are bound to the owners of goods shipped for the due carriage thereof, and are liable for any negligence whereby the goods may be damaged. If without fraud the master makes a charter party the ship-owner is not thereby divested of liability, but is still liable for the performance of such duties as are not inconsistent with the stipulations of the charter party. *Tiffin v. Webb* ... .. 54

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*New trial—Setting aside verdict—Excessive damages.*

Where the amount found by the jury was largely in excess of the amount which the evidence warranted, the Court, on a rule to set the verdict aside, did not avail of its power to reduce the verdict, but left it optional with the plaintiff to enter a verdict for a reduced sum or take a new trial, the defendant in the latter case paying the costs of the first trial. *Dunn v. Dunn*... .. 210

*New trial—Excessive damages—Landlord and tenant—Covenant to erect—Breach—Damages, true measure of.*

In an action brought to recover damages for breach of covenant by tenant in not erecting certain buildings on the demised land—there remaining to the tenant thirty years of an unexpired term—(the value of the buildings to be erected being fixed at £2,000), the jury found a verdict for the landlord £750, evidently basing their finding on the £2,000, the value of the work to be done, rather than on the damages that might arise from its non-performance.

On a rule nisi to set aside the verdict on the ground that it was excessive—

*Held*—The rule should be made absolute and a new trial granted, unless the plaintiff agreed to a reduction of damages to £400.

*Held*—The jury should have considered that it was the reversionary interest that was principally injured, and in estimating their damages they should have taken into consideration the length of lease the tenant had before the landlord's reversionary interest should have become an interest in possession. *Thomas, Executor of Hutchings, v. Bennett* ... .. 252

*Possession of locus in quo by one of next of kin—Trespass—Right of administrator to sue in his own name for trespass.*

Even when one of the next of kin has entered thirteen years before the trespass complained of was committed, and held possession under a partition verbally made of the *locus in quo*; this does not constitute the right to sue for trespass, the action must be taken in the name of the administrator. *Webber, Administrator, v. Mansfield*... .. 513

*Principal and agent—Owner of ship and master—Death of master—Acting master, power to bind owner—Service of writ on acting master—Defendant beyond jurisdiction.*

Where the defendant resided in Wales and the master of his ship had died at St. John's, Newfoundland, where she had put into for repairs,

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*Held*—That the acting master of the ship (the mate) is to be deemed the recognized agent of such owner for the purpose of compelling him to accept service of a writ on behalf of the owner. *Dooley v. Jones*... .. 202

*New trial—Misdirection—Nondirection—Contrary to evidence—Trespass—Shooting a dog—“At large without the owner or other person in charge.”*

Where the Court was of opinion that the preponderance of evidence was in favor of defendant, and the jury had found a verdict for the plaintiff, they refused to overrule the decision of the jury within whose province the determination of matters of fact lay. *Graham v. Pynn* ... .. 516

*Prohibition, writ of—Committee of House of Assembly—Enquiry into controverted election—23 Vic., cap. 11—Adjournment from day to day—Falsification of Journals of Assembly.*

Under 23 Vic., cap. 11, an act for the trial of controverted elections, a petition was, on the 18th of February, 1870, presented to the House of Assembly by Henry LeMessurier and John Woods, complaining of the undue election and return of F. B. T. Carter, Esq., and Edward Evans, Esq., for the District of Burin. The 24th of the same month at 4 p. m. was fixed by the House of Assembly for the consideration of the petition. On the said day and at the time appointed, Carter and Evans attended with their agents and attorneys, having duly apprised the Speaker of their attendance. The order of the day for considering the petition was then read, previous to calling the House. The House adjourned for one week, twenty members (the number required for the trial of an election petition) not being present. The Assembly after meeting at the expiration of the week continued to adjourn until the 2nd April following, when, having met, it proceeded to appoint a committee to consider the election petition. An application was then made to the Supreme Court on behalf of the sitting members for a writ of prohibition, directed to the petitioners and the committee to restrain the former from prosecuting and the latter from proceeding with the enquiry on the grounds (1) That the House of Assembly on February 24th, the day appointed for considering the petition, omitted to call the House before proceeding with the order of the day ; (2), That by having adjourned for a week instead of to the following day, the committee were illegally constituted. A rule *nisi* having been granted, the Attorney General appeared for the petitioners and committee and contended (a), That the court had no jurisdiction over the proceedings of the House of Assembly ; (b) That the promovents should have appeared before the committee before applying for the writ ; (c), That the omission to call the House and the adjournment for a week were irregularities

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which could not affect the constitution of the committee ; (d) That the irregular adjournment of the House was cured, by the Speaker, officers and certain members of the House meeting each day during the week of adjournment ; and (e), That if the committee were legally appointed, they were consequently not an inferior Court and a writ of prohibition would not therefore lie.

*Held*—(Making the rule absolute). There is nothing in the character or constitution of the inferior Court (the election committee) as emanating from the House of Assembly which limits or restricts the jurisdiction of the Supreme Court over it. The *Lex et consuetudo Parliamenti* itself part of the law of England, has no application to Colonial Legislatures.—(*Kielly v. Carson*.—*Doyle v. Falconer*, followed).

*Held*—The appointment of the committee was contrary to and inconsistent with the requirements of the Statute in that it was imperative and absolute and the very substance of the enactment that the Assembly should adjourn to the next day and not over for a week. There was therefore no committee and no court, and all proceedings under it were null and void. The Speaker, officers, and some of the members voluntarily assembling each day during the adjournment had no power in law, political or legislative, and cannot overrule a former resolution of the House.

*Held*—Whenever a body of men with some plausible show of jurisdiction assume to exercise judicial functions whereby the rights of the subject are endangered, a writ of prohibition will go to stay such usurped authority. *LeMessurier et al v. Carter et al* ... .. 301

*Recognizances—Default of defendants—Estreat—Notice 11 & 12 Vic., cap. 42—Jurisdiction of Court in estreat.*

The Courts of this Colony are invested with all the powers and jurisdiction possessed by the Courts in England for estreating recognizances.

Where it was objected that the notice required by 11 & 12 Vic., cap. 42, to accompany the recognizance was omitted and not given by the justice to the accused or bail, the Court held such objection fatal to the application for a rule to estreat the recognizance.

A recognizance to be valid under the statute must state the offence with which the accused is charged, or at least show the recognizance was for his appearance to answer some charge of criminal nature made against him. *Queen v. Cruickshank et al* ... .. 50

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*Trespass—General issue, plea of what evidence may be given under—Question of title, how pleaded—Amendment of pleadings—27 Vic., cap. 10.*

In an action for trespass when the only plea on record was the general issue—not guilty, the defence was not allowed to give evidence as to ownership, but the Court permitted a plea alleging title to be added to the record. *Byrne v. Power* ... 102

### PREFERENTIAL CLAIMS. See INSOLVENCY.

### PRINCIPAL AND AGENT—

*Government—Poor Commissioner—Authority necessary to bind Government.*

Where it had appeared that a Poor Commissioner had no express authority to effect purchases on account of the Government, but had a general authority in cases of pressing destitution to contract for supplies.

*Held*—The *bona fide* exercise of such authority would be binding on the Government. *Henderson v. Government of Nfld.* 355

*Master and servant—Medical attendance for servant—Power of servant to bind master.*

Where a telegraphic repairer whilst engaged in the business of the company accidentally received a severe gunshot wound, he was sent for medical treatment to a physician by the operator under whom he was working. The operator, it appeared, had no authority to contract debts on behalf of the company except to a trifling amount. The occurrence was communicated to the company. No proof was given that the company had notified the physician that they would not be liable until after the expenditure had been incurred. In an action by the physician the jury gave a verdict for \$130. On a rule *nisi* to set aside the verdict,

*Held*—(Discharging the rule). Where a principal, having received information by a letter from his agent of his acts touching the business of his principal, does not within a reasonable time express his dissent to the agent, he is deemed to approve his acts and his silence amounts to a ratification of them.—*Gallop v. Newfoundland and London Telegraph Company* ... 195

*Mutual Insurance Club—Payment by member of contribution to secretary—Insolvency of secretary—Liability of members for default of secretary.*

The plaintiff's vessels were insured in a Mutual Insurance Club, and being lost he was awarded the full amount due him.

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The defendant paid his full share to the secretary of the club, the latter before final payment to the plaintiff died and his estate was found to be insolvent. In an action against the defendant for a repayment of his contribution already paid the secretary,

*Held*—The defendant having paid his proportion to the secretary discharged his obligation and cannot be called on to answer for the secretary's default.

The secretary was the agent for the plaintiff and a payment to the former was a payment to the latter. *Donnelly v. Munn.* 553

PRIORITY OF LANDLORD. *See* LANDLORD AND TENANT.

PROHIBITION, WRIT OF. *See* PRACTICE.

PUBLIC OFFICER. *See* TRESPASS.

*Recognizances—Estreat—Escape—Non appearance — 11 & 12 Victoria.*

The Supreme Court has jurisdiction in proceedings for estreating recognizances. By 11 & 12 Victoria the prescribed notice must accompany the bond.

There can be no breach if, in the condition of the bond, no legal offence is set out.—*Queen v. Cruickshank et al ...* 32

RECTIFICATION. *See* CONTRACT.

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*Bill of lading—Shipowner's liability for damage to cargo—Improper stowage.*

A carrier is only bound to use all reasonable and proper means, but not every possible means, to secure the safe stowage of his cargo. It is not incumbent on him to take special and exceptional precaution for its safe carriage. *Avery v. Inman S. S. Company* ... .. 357

*Bottomry bond—Personal liability of owner—Wages of seamen.*

The *Emma*, of which the defendant was the owner, effected a bottomry bond at Cadiz for repairs on her voyage to England from Newfoundland. On arrival of ship the defendant did not take up the bond. The plaintiff proceeded against vessel and sold the same to satisfy the bond. The master and crew having intervened for wages, the latter were paid out of the proceeds of the sale. The balance was insufficient to pay the amount due under the bond. In an action against the defendant for the difference as money paid to the defendant's use,

*Held*—The hypothecation of the ship does not render the owner personally liable. *Shaw v. Bartlett* ... .. 85

*Insurance—Total loss—Abandonment—Freight paid by agent of underwriters, right to set-off freight against insurance on cargo—Practice—Set-off.*

The defendant became an underwriter on a cargo of lumber which became a total loss, and an abandonment of such was accepted. At the express request of the underwriters, and for them, the plaintiff appointed an agent to realize the wrecked cargo. The agent, out of the proceeds of the cargo, appropri-

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ated \$320 to satisfy a claim preferred by the master of the wrecked ship for freight *pro rata* on said cargo. In an action against the underwriters for the insurance it was contended that the underwriters had the right to set-off against the plaintiff's claim the sum so paid by the agent for freight.

*Held*—No such right of set-off could be maintained. The cargo was abandoned and accepted by the underwriters; the original owner ceased *ipso facto* to have any concern in it.

*Rendell & Co. v. Duder* ... .. 468

*Salvage—Award—Apportionment.*

A sealing schooner of fifty-seven tons, with a crew of twenty-four men, while on her way to prosecute a sealing voyage, fell in with a sailing vessel on the south coast of Newfoundland, abandoned, drifting about in a string of ice, about sixty miles from land, and successfully brought her into port after five days, with much labor. The value of the property salvaged was \$5,800. In a suit instituted for salvage the Court awarded a sum amounting to four-sevenths of the appraised value and directed that the award be apportioned amongst the owner and master and crew of the salvaging schooner upon the principle upon which the proceeds of the sealing voyage would be distributed, with the exception that the men who went on board the wreck and navigated her to port, having incurred greater risk than the rest of the crew, should receive from the crew's whole salvage, \$20 to the mate and each of the men \$10, in addition to their other shares. *The Caroline Brown*... ..

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*Salvage—Award—Apportionment—Appropriation by salvaging crew of property salvaged—Costs—Joint service—Two sets of salvors.*

A sealing schooner of one hundred tons with a crew of fifty men while prosecuting a sealing voyage, fell in with a sailing vessel of one hundred tons, on the north-east coast of Newfoundland, abandoned, tossing about in the trough of the sea, about eighty miles from St. John's. A portion of the crew of the sealing schooner, with great toil and considerable risk of life, succeeded in boarding her and navigating her to port after five days, having experienced very tempestuous weather on the voyage. The value of the property salvaged was appraised at \$13,897. In a suit instituted for salvage the Court awarded a sum of \$4,000, and directed that the award be apportioned amongst the owner, master and crew of the salvaging schooner upon the principle upon which the proceeds of the sealing voyage would be distributed, with the exception that the men who went on board the wreck and navigated her to port, having incurred greater risk than the rest of the crew, should receive from the crew's whole share of salvage, as follows: \$30 to the sealer in charge of the salvaging crew and \$20 to each of the others.

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A charge of wrongfully appropriating to their own use a quantity of ships' stores having been made against the salvors, the Court ordered that the extra sums awarded them be not paid until they had cleared themselves of the charge.

When a joint salvage service has been performed and the salvors engage separate proctors the Court will only allow costs against the respondents for one set of salvors. *The Clara* ... 480

*Sealing voyage—Desertion and abandonment of voyage by portion of crew—Right of deserters to participate in subsequent earnings of voyage—Expenditure by crew for labor sculping a whale, liability of owner of vessel to contribute.*

The plaintiff was one of a crew of seventeen men on board a small schooner engaged in the prosecution of a sealing voyage from the first day of March. Having become jammed in the ice and drifting into Bay St. George in Newfoundland, nine of the crew, with the assent of the master, left the vessel, abandoned the voyage and proceeded to their homes. Some few days after the vessel, being released from the ice jam, fell in with a dead whale afloat on the water, which was towed into port, sculped, barrelled and conveyed to St. John's, and sold for \$670 to the defendant. It was admitted that the defendant (the owner of the schooner) was entitled to half the proceeds of the whale; but it was contended by the defendant, on the part of the crew who had abandoned the voyage, that they also were entitled to participate in the profits of the whale, and that the plaintiff was not entitled to one-ninth of one-half as claimed by him; and further, that a sum of \$40, paid for sculping the whale, being labor which the crew were able and bound to perform, should be charged altogether to their share.

*Held*—That the members of the crew who left the vessel and abandoned the voyage were not entitled to participate in her subsequent earnings.

*Held*—The work of sculping the whale being work with which the crew were not acquainted, and the owner of the vessel having participated in the profits of the work for which the \$40 was paid, the latter must be held liable for half of the expenditure. *Hopkins v. Duder* ... .. 486

*Shipment of goods—Stoppage in transitu—Bills of exchange for cargo accepted—Insolvency of vendee, what is.*

When goods are consigned on credit by one merchant to another, and whilst on their way and before they are delivered the consignee becomes insolvent, the consignor by law is permitted to resume possession of the goods or what is called stoppage in transitu.

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The fact of bills of exchange having been drawn and accepted for the price of the cargo is no bar to the right of stoppage.

Even where goods are sold on credit and part payment made the consignor will be entitled to stop them if the consignee be shewn to be insolvent even before the credit has expired.

A declaration of insolvency is not necessary to enable the consignor to avail of the right of stoppage. It is sufficient to show that at the time the goods were stopped the consignees were under a general inability to pay their debts. *Barnes v. Lopez* ... .. 89

*Merchants' Shipping Act—Transfer of ships—Representatives of deceased owners joining in transfer—Attachment of ship for equitable interest.*

Under the Merchants' Shipping Act, 1854, the owners of a ship named in the register are to be the only owners recognized by law, and the representatives of deceased owners are not allowed to appear on such register or to join with the survivors in any bill of sale.

A party with an equitable interest in a ship cannot take the corpus of the ship by attachment out of the possession of the legal owner to satisfy the interest. *Goodfellow v. Talbot* ... 512

*Wreck and Salvage Act, 23 Vic., cap. 5—Jurisdiction of commissioner.*

A wreck commissioner under 23 Vic., cap. 5, has no jurisdiction over property found and taken at sea outside the three mile limit. *Brenton v. Birkett* ... .. 81

## STATUTE OF LIMITATIONS—

*Debt—Specific payment, effect of—Non-suit—Rule nisi.*

In order to take a case out of the operation of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt. *Newman et al v. Blackburn, Admr.* ... .. 249

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TRAVELLING EXPENSES. *See* COSTS.

## TRESPASS—

*Assault and battery—Public officer—Public office—When a plaintiff may be non-suited.*

A went to the office of B, who held a certain public office, to request that a license to search for minerals might be granted to him. B refused to attend to him; angry words passed between them, and B told A to leave his office; this A refused to do and remained insisting on obtaining a satisfactory answer. Upon this B laid his hands on A to remove him, and subsequently sent for a police officer, when A left. In an action for damages for assault and battery—

*Held*—B was lawfully in possession of his office, and A wrongfully remained after being requested to leave, and the assault was committed for the purpose of expelling him.—There is no analogy between a common inn and a public office.

In no case can a plaintiff be non-suited against his will, but the objection must be stated at the trial; the reservation of the objection on a motion for non-suit implies a consent to a subsequent non-suit should the Court be of opinion it ought to have been had at the trial. *Mitchell v. Warren* ... 275

*Conversion of goods—Police officer—Costs.*

The Court refused to allow a successful defendant costs when the action was against a police officer in an action for the conversion of goods. *Netherall v. Mitchell* ... 157

*Negligence—Master of tug—Injury to pier—Master of ship paying damage—Right to recover from wrongdoer.*

Where the captain of a tug wrongfully took a ship from a place of safety and left her in a dangerous situation whereby she injured a neighboring pier, the owner of the ship without any consultation with the captain of the tug, compensated the pier owner for the injury done. A jury found a verdict against the master of the tug for damages to the vessel and for the amount paid to the owner of the pier. On a rule nisi to set aside the verdict for the latter amount,

*Held*—By paying for the injury to the pier without consulting the captain of the tug the owner of the ship acted without authority and could not, therefore, under the well-known rule

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of law which precludes a volunteer from recovering over the debt of another paid without request of such other and without any legal obligation on his part, recover from the master of the tug the amount mistakenly paid by him. *Martell v. Whitten.* 200

## TROVER—

*Fishing craft-- Ownership-- Possession.*

In order to succeed in an action of trover the plaintiff must have the immediate right of possession in the article wrongfully converted. *Inkpen v. Stevenson* ... .. 220

*Seals panned on ice-fields -- Reducing into possession -- Abandonment--Recovery--Gift of seals panned on ice-fields not reduced into possession--Practice--New trial.*

In an action of trover brought to recover the value of eight hundred seals alleged to have been wrongfully taken at the seal fishery, it appeared that the plaintiff had found a quantity of seals panned and flagged by one White, who had abandoned them himself, but had sent a message to the defendant that he might take the seals so left on the ice. The defendant proceeded to the locality where the seals were and found that the plaintiff had taken some of them on board his vessel, had counted others of the patch, and was in the act of taking on board his vessel the remainder, his crew then being in charge. The defendant then took charge of the remainder of the seals and had them conveyed on board his own vessel, and refused to permit the plaintiff to participate in the same. In an action by the plaintiff for the seals so taken the jury found for the plaintiff; on a rule nisi to set aside the verdict,

*Held*—Making the rule absolute (Hayward, J., differing),—there was a valid gift from White to the defendant such as would cause a legal transfer of property; and further, it was in the power of White to transfer property floating on the sea which he had himself the power to secure.

*Held*—The principle of constructive possession of the whole by reason of possession of a part does not apply in the case of seals situated as these were, in relation to mere finders who were not killers. *Doyle v. Bartlett* ... .. 445

*Seals panned on the ice-fields--Reducing into possession--Abandonment--Recovery--Salvage--New trial--Misdirection.*

In an action for trover brought to recover the value of one thousand seals, alleged to have been wrongfully taken at the seal fishery, it appeared that the plaintiff's crew, having killed large quantities of seals, sculped, panned, and flagged the same, some being cut open and others left round. Owing to the

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shifting of the ice, the seals thus secured were carried away from where the plaintiff's vessel lay and brought near that of the defendant, whose crew took the seals sought to be recovered on board.

The jury found for the plaintiff.

On a rule nisi for a new trial it was contended that the jury were misdirected in that the judge should have told the jury that if the plaintiff's crew had no present power to recover the seals, their right of property in them had been lost.

*Held*—(Robinson, J., differing). By killing the seals and reducing them into possession by sculping, panning and flagging, the plaintiffs, through their crew, had obtained an absolute property in them which could not be diverted without their consent. Nor is it necessary to secure and continue the possession originally obtained by taking the seals on board, all that is required for the acquisition of an absolute property in animals *feræ naturæ* are killing and seizing. Killing without seizing, that is, taking possession, would not avail to establish property. *Clift et al Kane et al* ... 327

## TRUST—

*Establishment of alleged trust—Husband and wife living apart*  
*Death of wife, intestate—Interest of husband in wife's estate.*

The deceased for several years before her death was separated and lived apart from her husband with her only surviving child. During the separation the husband contributed nothing towards the support of the wife and child. The child, a son, lived with his mother, and from time to time paid in his wages to her. Deceased at the time of her death had accumulated about \$1,000. A suit was taken against the administrator of deceased by the son who claimed the whole fund, in that it was given by him to his mother in trust for his use, and on the other hand it was claimed by the husband of deceased as her earnings to which he was entitled *jure mariti*.

*Held*—The monies of intestate were partly monies received by her in trust for the use of her son and partly monies earned by her and added to monies given her by her husband and son and as such must be equally divided amongst husband and son. *Whibby v. Walbank* ... 286

TRUSTEE, ERRONEOUS PAYMENT BY. *See* INSOLVENCY.

TRUSTEES' COMMISSION. *See* INSOLVENCY.

TRUSTEE, SUFFICIENT AVERMENT OF OFFICIAL CHARACTER OF. *See* PRACTICE.

UNDUE INFLUENCE. *See* WILL. PAGE

UNDUE PREFERENCE TO CREDITOR. *See* INSOLVENCY AND  
BILL OF SALE.

UNSEAWORTHINESS. *See* INSURANCE AND PRACTICE.

USAGE OF TRADE IN CUSTOM BONDS. *See* BOND.

VENDOR AND PURCHASER—

*Transfer of property necessary to confer ownership—Attachment  
by third party.*

A quantity of seals owned by a party residing at St. Julien's, on the so-called French Shore, were shipped to a merchant at St. John's, accompanied by a letter which stated that the owner "sends his winter's fat to him by James McGrath." The shipper at the time was indebted to the merchant. Before the seals were delivered they were attached by a third party and by the sheriff.

*Held*—The seals had not vested in the merchant; and he would not have been bound to bear the loss if they had been lost on the voyage. They had not been purchased, had not been shipped by his order, and he had not pledged himself to accept the same. *McLoughlan v. Kough* ... .. 205

VERDICT. *See* PRACTICE.

WAGES OF SEAMEN. *See* SHIPPING.

WARRANT. *See* PRACTICE.

WARRANTY. *See* INSURANCE.

WATER COMPANY—

WAY—

*Negligence—Board of Works, duties of—Streets, repairs of—  
Injury to person—Liability.*

Where the declaration stated "that the defendant (the Chairman of the Board of Works) in repairing, extending, and widening Gower street, had negligently left or caused to be left a certain stick in or upon the said highway, or abutting upon the same, whereby, &c., &c.

*Held*—That the declaration was bad for not showing any facts creating a duty upon the defendant, or averring that defendant had any knowledge or notice of the existence of the stump, or the possession or control over any funds to enable him to remove it. *Cadwell v. Warren* ... .. 176

*Construction of—Absolute bequest—Mere power to appoint—Intention of testator.*

Under his last will and testament the testator made the following bequest: "And my further will and desire is that at the death of my said wife, £60 sterling shall be at her disposal by will or otherwise to such person or persons as she will think proper." The executors of the wife claimed this sum as an absolute bequest, not to be paid till after her death; whilst the executor of the testator contended it was a mere power to the wife to appoint by will or otherwise that sum to be paid to such person as she would think proper, and she having omitted to make an appointment her representatives had no title to it.

*Held*—That the words amount to an absolute bequest, and create an absolute interest in the testator's assets to the extent of £60 to his wife or her representatives. *Mandeville et al v. Pinsent* ... ..

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*Construction of—Words: "The remainder to be divided between the parties"—Inoperative will as evidence of a collateral fact.*

Where the testator's will, after naming several legatees for certain specified legacies, concluded with the following residuary clause: "The remainder to be divided between the parties."

*Held*—(Hoyles, C. J., differing)—The words do not mean the next of kin, but the parties named just before in the will. The article "the" has a restrictive operation.

An inoperative will is evidence as an admission under the hand of the testator to confirm or contradict testimony of an independent transaction of his. *Power et al v. Menchinton* ...

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*Construction of—Contingent estate—Absolute estate.*

Where the testator's will contained the following clause: "In case either of my children should die unmarried or married without lawful issue, the property and money I leave to such child is to descend to his surviving brother, or his issue, and in the event of both my sons dying without issue, the property shall go to my wife during her lifetime, and at her decease descend to my nephew, Henry Percy Roberts, or his heirs;" one of the sons having died before he attained the age of twenty-one, the nephew claimed an interest in the estate contingent on his surviving cousin dying without issue.

*Held*—That the words of the will confer on the surviving son a present absolute estate, divested of any condition, limitation or remainder. *Brown et al, Exrs. Roberts v. Roberts* ...

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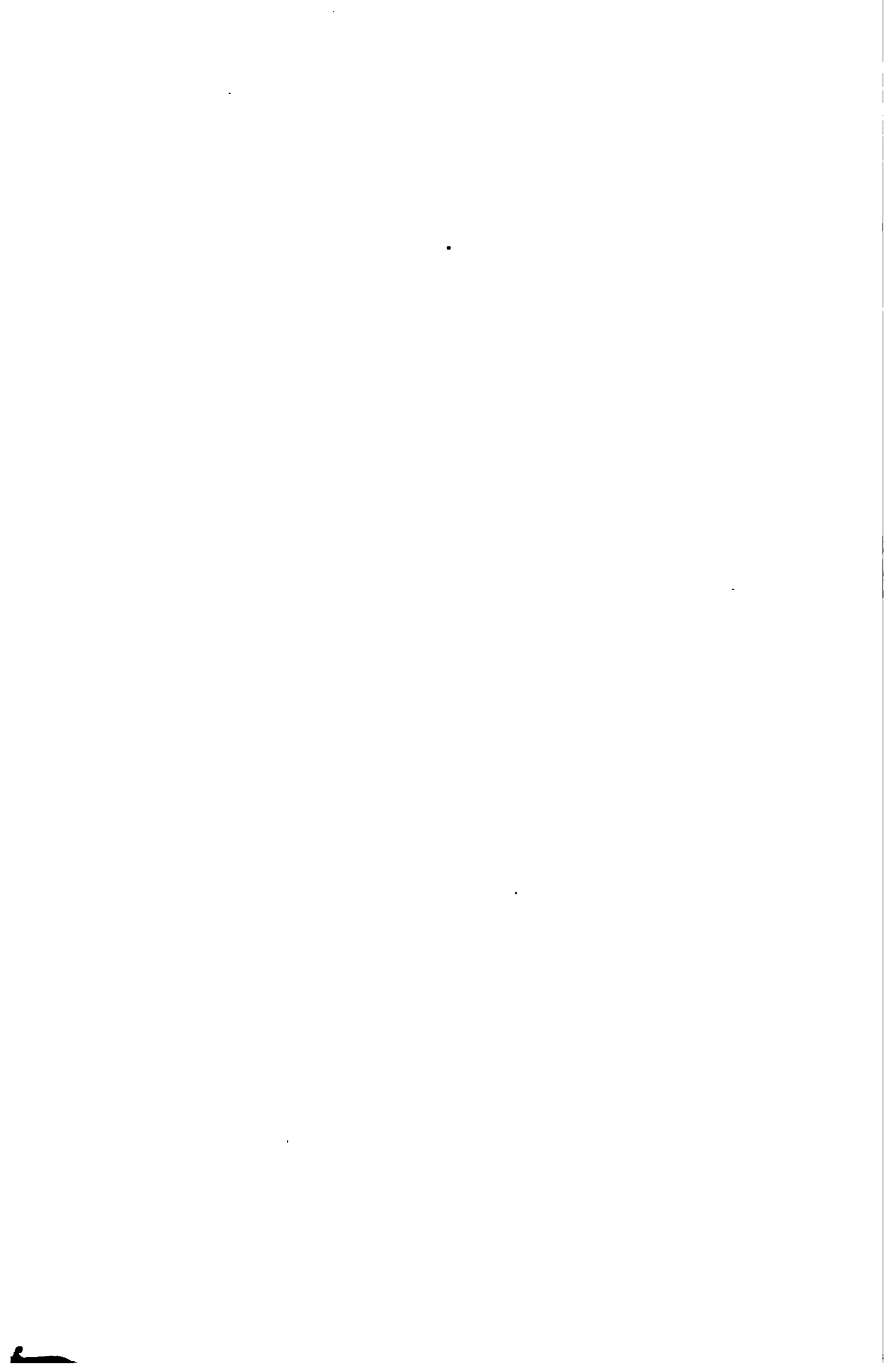




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